Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross Blue Shield,

Petitioner,

v.

DENISE FINN MCVEIGH, as administratrix of
the Estate of Joseph E. McVeigh,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal question jurisdiction exists over a suit by a federal government contractor to enforce, on behalf of the United States, a provision in a health benefits plan for federal employees that is part of a government contract established pursuant to the Federal Employees Health Benefits Act.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

STATEMENT PURSUANT TO RULE 29.6

Empire HealthChoice Assurance, Inc., doing business as Empire Blue Cross Blue Shield, is wholly owned by WellChoice, Inc. through WellChoice Holdings of New York, Inc. WellChoice, Inc. is a publicly traded company, and no publicly held company owns ten percent or more of its stock. Neither Empire HealthChoice Assurance, Inc., nor WellChoice Holdings of New York, Inc., is publicly traded.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
STATEMENT PURSUANT TO RULE 29.6 ii
TABLE OF AUTHORITIES v
TABLE OF APPENDICES viii
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 2
A. The Statutory, Regulatory, and Contractual Scheme 3
1. The Service Benefit Plan 3
2. Plan Benefits Terms and Limitations 4
3. Plan Funding 5
4. FEHBA's Preemption Provision 6
B. The Proceedings Below 7
REASONS FOR GRANTING THE PETITION 10
A. The Court of Appeals' Decision Creates Clear Conflicts in the Circuits 10
B. The Court of Appeals' Decision Potentially Throws into Disarray a Nationwide Program Affecting Millions of People 13

C. The Court of Appeals Wrongly Concluded That The Federal Courts Lack Federal Question Jurisdiction Over Suits by Carriers to Enforce FEHBA Contract Provisions.....15

1. Federal Jurisdiction Flows from FEHBA's Preemption Provision.....15

2. Federal Jurisdiction Exists Because Congress Intended That Federal Law Would Govern Suits to Enforce the Contracts Contemplated By FEHBA.....18

3. Federal Jurisdiction Exists Because, Under *Boyle*, Federal Common Law Controls the Case.....21

D. The Court Should Resolve the Circuit Conflict by Granting Certiorari in This Case.....25

CONCLUSION.....26

TABLE OF AUTHORITIES

Page

CASES

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995).....24

Blue Cross & Blue Shield of Fla., Inc. v. Dep't of Banking & Fin.,
791 F.2d 1501 (11th Cir. 1986).....12

Blue Cross & Blue Shield of Illinois. v. Cruz,
396 F.3d 793 (7th Cir. 2005), *petition for cert. filed*, No. 04-1657 (June 6, 2005).....11, 18, 24, 25

Botsford v. Blue Cross & Blue Shield of Montana, Inc., 314 F.3d 390 (9th Cir. 2002).....18

Boyle v. United Technologies Corp.,
487 U.S. 500 (1988).....*passim*

Caudill v. Blue Cross & Blue Shield of N.C., Inc.,
999 F.2d 74 (4th Cir. 1993).....*passim*

FMC Corp. v. Holliday,
498 U.S. 52 (1990).....17

Grable & Sons Metal Products, Inc. v. Darue Engineering. & Manufacturing,
125 S. Ct. 2363 (2005).....21

Hayes v. Prudential Ins. Co.,
819 F.2d 921 (9th Cir. 1987).....12, 17

Illinois v. Milwaukee,
406 U.S. 91 (1972).....21

Jackson Transit Authority v. Local Division 1285,
457 U.S. 15 (1982).....19, 20

MedCenters Health Care v. Ochs,
26 F.3d 865 (8th Cir. 1994).....11, 24

Muratore v. United States OPM,
222 F.3d 918 (11th Cir. 2000) 4

Nesseim v. Mail Handlers Benefit Plan,
995 F.2d 804 (8th Cir. 1993) 12

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 17

Rocky Mountain Hosp. & Med. Serv. v. Phillips,
513 U.S. 1071 (1995) 14

Rocky Mountain Hosp. & Med. Serv. v. Phillips,
514 U.S. 1048 (1995) 14

Tackitt v. Prudential Ins. Co.,
758 F.2d 1572 (11th Cir. 1985) 12

United States v. County of Allegheny,
322 U.S. 174 (1944), *overruled on other grounds, United States v. City of Detroit*,
355 U.S. 466 (1958) 19

United States v. Little Lake Misere Land Co.,
412 U.S. 580 (1973) 18

STATUTES

5 U.S.C. § 8709 14

Federal Employees Health Benefits Act,
5 U.S.C. § 8902 20
5 U.S.C. § 8902(d) 4
5 U.S.C. § 8902(m)(1) (1994) 15
5 U.S.C. § 8902(m)(1) (2000) ..... *passim*
5 U.S.C. § 8903 ..... 4, 20
5 U.S.C. § 8906 5
5 U.S.C. § 8907(b) 4
5 U.S.C. § 8909 ..... 5, 6

5 U.S.C. § 8959 14

5 U.S.C. § 8989 14

5 U.S.C. § 9005 14

10 U.S.C. § 1103 14

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1144(a) 8, 17

REGULATIONS

5 C.F.R. § 890.503(c)(2) 6

48 C.F.R. § 1615.902 6

48 C.F.R. § 1632.170(b) 5

60 Fed. Reg. 16,037 (1995) 14

LEGISLATIVE HISTORY

Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363 7

H.R. Rep. No. 86-957 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913 3

H.R. Rep. No. 95-282 (1977) 15

H.R. Rep. No. 105-374 (1997) 7, 16, 18

S. Rep. No. 95-903 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1412 15

MISCELLANEOUS

Patricia G. Tobin, *The Rawlings & Assocs. National Subrogation Law Manual 1998* (1997) 24

TABLE OF APPENDICES

Page

Appendix A -- Opinion of the United States Court of Appeals for the Second Circuit, Dated January 14, 2005 ..... 1a

Appendix B -- Opinion of the United States Court of Appeals for the Second Circuit Denying Petition for Panel Rehearing, Dated March 16, 2005 ..... 46a

Appendix C -- Order of the United States Court of Appeals for the Second Circuit Denying Petition for Panel Rehearing and Petition for Rehearing En Banc, Dated May 10, 2005 ..... 52a

Appendix D -- Memorandum Opinion and Order of the United States District Court for the Southern District of New York, Dated September 18, 2003 ..... 54a

Appendix E -- Judgment of the United States District Court for the Southern District of New York, Dated September 23, 2003 ..... 63a

Appendix F -- Brief for the United States As Amicus Curiae Supporting Appellant's Petition for Rehearing and Rehearing En Banc, Dated February 17, 2005 ..... 65a

Empire HealthChoice Assurance, Inc. ("Empire") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 396 F.3d 136. The opinion of the court of appeals denying petitioner's petition for panel rehearing (Pet. App. 46a-51a) is reported at 402 F.3d 107. The order of the court of appeals denying petitioner's petition for panel rehearing and for rehearing en banc (Pet. App. 52a-53a) is not reported. The opinion of the district court is not reported but can be found at 2003 U.S. Dist. LEXIS 16276 (Pet. App. 54a-62a).

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2005. Petitioner timely filed a petition for rehearing and for rehearing en banc. The court of appeals denied the petition for rehearing and for rehearing en banc on May 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901-8914, provides in pertinent part:

5 U.S.C. § 8902(a):

The Office of Personnel Management may contract with qualified carriers offering plans described by section 8903 or 8903a of this title, without regard to section 5 of title 41 or other statute requiring competitive bidding. Each contract shall be for a uniform term of at least 1 year, but may be made automatically renewable from term to term in the absence of notice of termination by either party.

5 U.S.C. § 8902(d):

Each contract under this chapter shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable.

5 U.S.C. § 8902(m)(1):

The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

STATEMENT

In this action, a divided court of appeals held that the federal courts lack subject matter jurisdiction over a suit to enforce the terms of a health benefits plan governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914. The suit was commenced by Empire, which administers, in parts of New York, the largest plan in the FEHBA program: the Service Benefit Plan (or the "Plan"). Local Blue Cross and Blue Shield entities, including Empire, administer the Plan in their particular localities pursuant to a federal government contract entered on their behalf by the Blue Cross and Blue Shield Association ("BCBSA") with the United States Office of Personnel Management ("OPM"). The Service Benefit Plan provides health benefits to over 4 million federal employees and annuitants and their dependents. Overall, approximately 8.5 million individuals obtain health benefits coverage through FEHBA-governed plans.

The particular Service Benefit Plan terms involved in this controversy concern reimbursement of benefits. Reimbursement is a species of subrogation and arises when the Plan has paid benefits to an enrollee for injuries and the enrollee then also collects from a third party in connection with those same injuries. In such circumstances, the Plan's provisions mandate

that the enrollee must reimburse the Plan for the benefits it has paid.

Here, after Empire brought suit to enforce the reimbursement terms against the estate of an enrollee who refused to comply with those terms, the court of appeals rejected federal question jurisdiction. It did so notwithstanding that the money collected through reimbursement inures to the benefit of the United States, the reimbursement terms were promulgated by OPM and are part of the government contract with BCBSA, FEHBA contains a broad preemption provision displacing state law that relates to health benefits, and other courts of appeals have reached the opposite result on the same issue. The Court should grant the petition for certiorari to resolve the resulting conflict in the circuits and to correct an erroneous decision that threatens turmoil in a significant national federal program.

A. The Statutory, Regulatory, and Contractual Scheme

1. *The Service Benefit Plan*. Congress enacted FEHBA in 1959 to provide "a measure of protection for civilian Government employees against the high, unbudgetable, and, therefore, financially burdensome costs of medical services through a comprehensive government-wide program of insurance for federal employees . . . , the costs of which [would] be shared by the Government, as employer, and its employees." H.R. Rep. No. 86-957, at 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913, 2914. Overall, Congress sought to "assure maximum health benefits for employees at the lowest possible costs to themselves and to the Government." *Id.* at 4, *reprinted in* 1959 U.S.C.C.A.N. at 2916.

To achieve these goals, FEHBA delegates expansive authority to OPM. The statute "'gives OPM the authority to administer the program by contracting with qualified private carriers to offer a variety of health care plans, 5 U.S.C. § 8902, distributing information on the available plans to eligible employees, [5 U.S.C.] § 8907, by promulgating necessary regulations [5 U.S.C.] § 8913, and by interpreting the plans to

determine the carrier's liability in an individual case, [5 U.S.C.] § 8902(j).'" *Muratore v. United States OPM*, 222 F.3d 918, 920 (11th Cir. 2000) (quoting *Kobleur v. Group Hosp. & Med. Servs.*, 954 F.2d 705, 709 (11th Cir. 1992)) (brackets in original).

One plan for which OPM has contracted is the Service Benefit Plan, a nationwide fee-for-service plan expressly described in FEHBA. 5 U.S.C. § 8903(1). In 1960, OPM contracted with BCBSA to provide the Service Benefit Plan. In signing the contract, BCBSA acts on behalf of the local Blue Cross and Blue Shield companies who administer the Plan in their respective localities. OPM and BCBSA annually renegotiate the government contract for the Service Benefit Plan, including the premium rates and the scope of benefits to be provided under the Plan.

2. *Plan Benefits Terms and Limitations*. By statute, each FEHBA contract, including the Service Benefit Plan, "shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable." 5 U.S.C. § 8902(d). The Statement of Benefits for the Service Benefit Plan is attached to and incorporated into the OPM-BCBSA contract and is the official description of benefits and other Plan terms. Court of Appeals App. ("J.A.") A30-31, A293-94, A703. Consistent with OPM's obligation to provide information to enrollees about coverage, FEHBA mandates that a copy of the Statement of Benefits "shall be issued" to "[e]ach individual enrollee." 5 U.S.C. § 8907(b).

Of particular relevance to this case are the terms in the Service Benefit Plan's Statement of Benefits concerning reimbursement. The Statement of Benefits provides (J.A. A785):

> If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:

> All recoveries you obtain (whether by lawsuit, settlement, or otherwise) . . . must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees . . . .

The OPM-BCBSA contract also elsewhere directly addresses reimbursement. It requires the carrier to make "reasonable effort to seek recovery of amounts to which it is entitled to recover in cases which are brought to its attention." J.A. A140, A310. Furthermore, the contract mandates that all Blue Cross and Blue Shield entities "shall subrogate under a single, nationwide policy to ensure equitable and consistent treatment for all Members under the contract." *Id.*

3. *Plan Funding*. The Plan's funding is delineated both in FEHBA and OPM's regulations. The United States itself, in an amicus brief in support of Empire in the proceedings below, has succinctly detailed the Plan's fiscal operations (Pet. App. 69a):

> By statute, the government and the enrollee share responsibility for premiums payable to the plan. 5 U.S.C. § 8906. The employing agency (or OPM for annuitants) pays 72% to 75% of the premium as part of its payroll costs funded by general appropriations. *Id.* §§ 8906(b)(1), (b)(2), (f). Premiums are deposited into a special Treasury fund called the Federal Employees Health Benefits Fund. *Id.* § 8909(a).
>
> Under the type of plan at issue in this litigation, the carrier draws against the Fund on a "checks-presented" basis to pay for covered health care services. *Id.* § 8909(a); 48 C.F.R. § 1632.170(b). Any balance in the Fund is not the property of [the] carrier. Rather, the carrier's profit, if any, comes from a negotiated service charge. *See National Ass'n of Postal Supervisors v. United States*, 21 Cl. Ct. 310, 315 (1990) ("The service charge is the only profit

> element of FEHBA. * * * [The] carrier may not make a profit on the premium charges themselves."), *aff'd mem.*, 944 F.2d 859 (Fed. Cir. 1991); *see also* 48 C.F.R. § 1615.902. Any surplus in a plan's contingency reserves may be used, at OPM's discretion, to defray future rates, reduce future government and employee contributions, increase plan benefits, or refund the monies to the government and plan enrollees. 5 U.S.C. § 8909(b); 5 C.F.R. § 890.503(c)(2).

Under this fiscal regime, money collected under the Plan's reimbursement terms does not belong to the carrier, but instead inures to the government's benefit. Pursuant to the BCBSA-OPM contract, the carrier must, and does, credit all reimbursement amounts to the Treasury fund, the source for the benefits in the first place. J.A. A877. As a result, the United States has said: Because "the carrier has no property interest in any balance remaining in the Treasury fund after benefits are paid out and reimbursements received," the "requirement that enrollees reimburse the carrier for monies obtained in tort suits is . . . a critical feature of the federal health benefits program that inures to the benefit of the government." Pet. App. 74a.

4. *FEHBA's Preemption Provision.* FEHBA contains an express preemption provision, codified at 5 U.S.C. § 8902(m)(1). As amended in 1998, the preemption provision currently provides:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1) (2000) (codifying Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363 (1998)).

In enacting the current preemption language, which "broaden[ed]" an earlier version of the preemption clause, Congress sought to ensure "the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live." H.R. Rep. No. 105-374, at 9 (1997) (J.A. A886). Congress added that the amendment "will strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts" and "will also prevent carriers' cost-cutting initiatives from being frustrated by State laws." *Id.*

B. The Proceedings Below

Joseph McVeigh, a Plan enrollee livi g in New York, was injured in an accident in 1997. The Pla paid benefits of approximately $157,000 in connection with those injuries. Subsequently, Mr. McVeigh filed a state tort action against the third parties that allegedly caused his injuries, and his estate pursued that action after his death in 2001. His spouse and his child brought additional actions on their own behalf. In 2003, the parties to the state tort actions announced a settlement of $3,175,000.

When the estate refused to reimburse the Plan for the benefits paid to Mr. McVeigh, Empire brought suit in the United States District Court for the Southern District of New York. Seeking reimbursement of $157,000, Empire's complaint asserts claims for breach of the Plan terms and for declaratory relief. Empire invoked the district court's federal question jurisdiction, alleging that the "action is founded on [FEHBA]; on federal contracts and regulations established pursuant to FEHBA; and on federal common law." J.A. A7. The district court dismissed the case for lack of subject matter jurisdiction. Pet. App. 62a.

A divided court of appeals affirmed. Pet. App. 1a-45a. Judge Sotomayor wrote the majority opinion (*id.* at 2a-24a), with Judge Sack submitting a separate concurring opinion. *Id.* at 25a-26a. Judge Raggi dissented. *Id.* at 27a-45a.

The majority determined that federal question jurisdiction was absent because state law governed the controversy, notwithstanding FEHBA's express preemption provision. That provision states that contract terms "preempt any State or local law . . . which relates to health insurance or plans" (5 U.S.C. § 8902(m)(1)), but the majority construed the "relates to" qualifier as applying only to those state laws that *specifically* regulate health insurance or plans, excluding from FEHBA's preemptive scope state laws of general application, such as state contract law. Pet. App. 14a-19a. The majority recognized that, in interpreting similar language in the preemption provision in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), this Court had reached an exactly opposite conclusion – namely, that state laws of general application are preempted. But the court of appeals viewed ERISA precedent as irrelevant to construing FEHBA's preemptive scope. Pet. App. 19a-21a. Judge Sotomayor added that, in her view, the preemption clause is "probably unconstitutional" as written because it provides that FEHBA *contract* provisions preempt state law; contract terms are not, she said, "Laws of the United States" capable of superseding state law within the meaning of the Supremacy Clause (U.S. Const. Art. VI, cl. 2). Pet. App. 11a.

The majority also found that federal jurisdiction could not be founded on federal common law, because it believed Empire could not satisfy the two-part test enunciated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), for creating federal common law. In *Boyle*, the Court required a government contractor, in order to establish a federal common law defense in a diversity suit, to show, first, the existence of "uniquely federal interests" in the dispute and, second, a "significant conflict" between the application of state law and federal policy or objectives. *Id.* at 507-08. The majority reasoned that Empire failed the second prong of the *Boyle* test because it purportedly had not established an "actual, significant conflict with [fed-

eral] . . . interests." Pet. App. 6a-7a (internal quotation marks omitted). The majority rejected the argument that the application of state law rules would upset Congress's desire for consistent, uniform FEHBA plan administration, asserting that state contract law was "'not at its core diverse, nonuniform, and confusing.'" *Id.* at 8a (quoting *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n.8 (1995)).

In his concurrence, Judge Sack wrote separately "to identify several issues that I think we do not decide." *Id.* at 25a. Among those issues was, he said, the constitutionality of FEHBA's preemption section, though he added that he found Judge Sotomayor's analysis "persuasive" and that the statute might be "*unavoidably* unconstitutional." *Id.* at 26a (emphasis in original). Judge Sack also emphasized that Empire, under *Boyle*, had plainly shown "uniquely federal interests" to be involved in its suit, but not the requisite "significant conflict." *Id.* at 25a.

Judge Raggi dissented, concluding that federal jurisdiction existed by virtue of the preemption provision. By providing for preemption, Judge Raggi explained, "Congress has identified a unique federal interest in ensuring national uniformity in the construction and enforcement of [FEHBA contract] terms." *Id.* at 35a. In addition, by amending the preemption provision in 1998 to eliminate the need for a conflict between the contract terms and state law, "Congress has implicitly authorized courts to employ federal common law to resolve disputes concerning coverage and benefits, even in the absence of the conflict generally required by *Boyle*." *Id.* Judge Raggi also rejected the majority's position that ERISA precedent should not be used to determine the reach of FEHBA's preemption provision, noting that the "statutes' preemption clauses are notably similar" and "the objectives of the two [preemption] laws are virtually identical" – namely, to ensure uniformity. *Id.* at 39a.

Empire filed a petition for rehearing and rehearing en banc. The United States, which did not participate in the proceedings

at earlier stages, filed a brief as amicus curiae supporting Empire's petition. *See* Pet. App. 65a-79a. Noting that carriers pursue reimbursement "on behalf of the United States" (*id.* at 73a), the United States argued that "suits to enforce contracts 'contemplated by federal statutes' set forth federal claims and state federal causes of action if Congress intended that the contracts be 'creations of federal law,' and that 'the rights and duties contained in those contracts be federal in nature.'" Pet. App 72a (quoting *Jackson Transit Auth. v. Local Division 1285*, 457 U.S. 15, 22-23 (1982)).

The panel denied rehearing by a 2-1 vote, issuing a supplemental opinion that reaffirmed its previous rulings on the preemption provision and the *Boyle* test. Pet. App. 46a-51a. The supplemental opinion also rejected the United States' arguments, finding that the preemption provision does not reflect the necessary Congressional intent to federalize FEHBA contract disputes when the carrier brings the action. *Id.* at 50a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case creates a clear conflict with numerous other circuits, threatens to cast the administration of an important federal program into disarray, and seriously errs in both its statutory and *Boyle* analyses. The Court should grant certiorari to resolve the circuit conflict and to undo the damage engendered by the court of appeals' erroneous determination.

A. The Court of Appeals' Decision Creates Clear Conflicts in the Circuits

The court of appeals readily acknowledged that its decision conflicts with multiple decisions of other courts of appeals. On the specific question whether federal question jurisdiction exists over FEHBA reimbursement suits, the court of appeals' decision conflicts with decisions of two other circuits. In *Blue Cross & Blue Shield of Illinois v. Cruz*, 396 F.3d 793 (7th Cir. 2005), *petition for cert. filed*, No. 04-1657 (June 6, 2005), the

Seventh Circuit recently reached the opposite result in precisely the same context in which the question is presented here, holding that federal common law governs a carrier's suit to enforce the reimbursement provision in the Service Benefit Plan. The Eighth Circuit also has ruled that federal jurisdiction exists over a FEHBA plan's suit for reimbursement. *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994). The holding in this case cannot be squared with these decisions.

The conflict with *Cruz* is especially stark. In *Cruz*, the Seventh Circuit explained that, under the FEHBA preemption provision, 5 U.S.C. § 8902(m)(1), FEHBA contract provisions preempt state subrogation law, thus vindicating "Congress's clear intent . . . to make benefits uniform for FEHBA plan enrollees of different states." 396 F.3d at 799. The court then proceeded to hold that federal common law must govern the dispute: "With no explicit statutory cause of action on which to rely and with state law preempted, Congress's clear intent to have uniform subrogation rules per the terms of the FEHBA-created contract require a judicially-crafted cause of action." *Id.* at 799-800 (internal quotation and citation omitted). Conversely, the Second Circuit held that the preemption clause can apply only to "a specific state law or state common-law principle 'relat[ing] to health insurance,'" and therefore cannot preempt state subrogation law. Pet. App. 15a.

Although *Cruz* was decided after the Second Circuit issued its decision in this case, the Second Circuit addressed *Cruz* in the supplemental opinion issued on denial of panel rehearing, and it explicitly acknowledged that the two decisions are irreconcilable. The Second Circuit noted its "disagreement with the conclusions reached in" *Cruz* and added that the "*Cruz* court rested its holding on arguments that we addressed and squarely rejected in our original opinion." Pet. App. 50a.

More broadly, the court of appeals' crabbed construction of FEHBA's preemption clause also conflicts with decisions in other circuits involving FEHBA disputes outside of the reimbursement area. Contrary to the Second Circuit's holding

bursement area. Contrary to the Second Circuit's holding that the FEHBA preemption clause cannot encompass state "laws of general application that make absolutely no reference to health insurance or plans" (Pet. App. 16a), numerous other courts of appeals have held that FEHBA preempts state laws of general application. *See Nesseim v. Mail Handlers Benefit Plan*, 995 F.2d 804, 806-07 (8th Cir. 1993) (state contract law); *Hayes v. Prudential Ins. Co.*, 819 F.2d 921, 926 (9th Cir. 1987) (state contract, tort, consumer protection, and fraud laws); *Blue Cross & Blue Shield of Fla., Inc. v. Dep't of Banking & Fin.*, 791 F.2d 1501, 1504-05 (11th Cir. 1986) (state unclaimed property law); *Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572, 1575 (11th Cir. 1985) (state contract law).

Furthermore, in its *Boyle* analysis, the Second Circuit's decision conflicts with *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74 (4th Cir. 1993). The Fourth Circuit found a "significant conflict between federal interests and state law" because "[a]pplication of state law . . . would result in a patchwork quilt of benefits that varied from state to state." *Id.* at 78-79. The court specifically noted the absence of "any specific conflict between federal interest and state law," but concluded that "that fact is not important here" because "[w]hen the federal interest requires the application of a uniform rule, federal common law displaces state law entirely." *Id.* at 79. The Second Circuit, by contrast, held that a conflict is not demonstrated under *Boyle* merely where application of different state laws "would undermine the federal interest in uniformity." Pet. App. 7a. The Second Circuit acknowledged that its application of *Boyle* was irreconcilable with that of the Fourth Circuit, stating that "[t]he Fourth Circuit reached a different conclusion in *Caudill*" with respect to the uniformity analysis. *Id.*; *see also id.* at 9a ("we again part ways with the Fourth Circuit's holding in *Caudill*" with respect to state court jurisdiction over federal common law issues).

B. The Court of Appeals' Decision Potentially Throws into Disarray a Nationwide Federal Program Affecting Millions of People

It is important for this Court to grant certiorari to eliminate these conflicts and the attendant uncertainty and disparate treatment that will result if the court of appeals' decision is allowed to stand. About 8.5 million enrollees receive health benefits through FEHBA plans, encompassing the employees and annuitants (and their families) of all branches of the federal government. The FEHBA program spawns numerous disputes – involving, for instance, enrollment and coverage, as well as subrogation and reimbursement – that are litigated in courts all across the country, due to the nationwide nature of the program.

The court of appeals' decision creates a cloud of uncertainty over much of this litigation. The government, carriers, and enrollees now cannot be confident of the scope of FEHBA preemption and whether a FEHBA dispute belongs in federal or state court. In particular, they cannot predict whether FEHBA preempts state laws of general application, such as contract and tort doctrines, consumer protection laws, and anti-discrimination rules, which can be used to challenge enrollment criteria. And the court of appeals' musings that FEHBA's preemption provision might be unconstitutional raise a new threshold issue that potentially could beleaguer *every* FEHBA preemption dispute.

These uncertainties will interfere with the timely and efficient resolution of FEHBA controversies, raising the cost to enrollees and, ultimately, to the United States, which subsidizes the FEHBA program. Moreover, the court's holding that FEHBA disputes should be relegated to state court and the vagaries of state law will contravene Congress's desire that FEHBA plan benefits and administration should be uniform regardless of the enrollee's place of residence. "This situation would be fundamentally unfair to many federal employees covered by Blue

Cross contracts because enrollees in some states would pay higher premiums to cover services provided only to enrollees in other states." *Caudill*, 999 F.2d at 79. And even if the different path taken by the court of appeals is confined to the Second Circuit, there will remain a discrepancy in treatment between residents of the Second Circuit and other FEHBA enrollees.

These daunting problems are not limited to FEHBA plans. At least five other federal programs involving government benefits contain preemption provisions modeled on FEHBA's. *See, e.g.*, 5 U.S.C. § 8709 (life insurance for federal employees); *id.* § 8959 (dental benefits for federal employees); *id.* § 8989 (vision benefits for federal employees); *id.* § 9005 (long-term care insurance for federal employees); 10 U.S.C. § 1103 (health benefits for dependents of military personnel). The Court should grant certiorari to resolve the serious difficulties created by the court of appeals' decision and to prevent those difficulties from spilling into other federal benefits programs.

This Court has previously recognized the importance of resolving any jurisdictional uncertainties under the FEHBA program. In 1995, in a controversy also involving the Service Benefit Plan, the Court granted certiorari to resolve whether state law contract suits brought by enrollees against carriers to obtain FEHBA benefits involve federal questions removable to federal court. *Rocky Mountain Hosp. & Med. Serv. v. Phillips*, 513 U.S. 1071 (1995). During the pendency of that case, OPM amended its regulations to clarify that such suits can be pursued only against OPM in federal court. *See* 60 Fed. Reg. 16,037 (1995). With the jurisdictional uncertainty presumably resolved by regulation, the carrier voluntarily dismissed its case in this Court. *See Rocky Mountain Hosp. & Med. Serv. v. Phillips*, 514 U.S. 1048 (1995). Though the context now is marginally different, the concerns raised by uncertain federal jurisdiction in FEHBA disputes remains the same. As it did in *Rocky Mountain*, the Court should grant certiorari here.

C. The Court of Appeals Wrongly Concluded That the Federal Courts Lack Federal Question Jurisdiction Over Suits by Carriers to Enforce FEHBA Contract Provisions

The court of appeals erred in rejecting federal court jurisdiction in this case for at least three distinct reasons: (1) FEHBA's preemption clause displaces state laws that relate to health insurance or plans, even if the state laws are of general application, thereby leaving federal law to govern FEHBA disputes; (2) this case involves enforcement of a federal government contract entered into pursuant to FEHBA and intended by Congress to be governed by federal law; and (3) the dispute satisfies the two-part test in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), for the application of federal common law.

1. Federal Jurisdiction Flows from FEHBA's Preemption Provision

Federal jurisdiction lies here because of the operation of FEHBA's broad preemption clause. As originally enacted, that clause provided that FEHBA contract provisions relating to benefits and coverage "preempt any state or local law . . . which relates to health insurance or plans *to the extent that such law or regulation is inconsistent with such contractual provisions*." 5 U.S.C. § 8902(m)(1) (1994) (emphasis added). In enacting this provision, Congress was concerned that the imposition of state law requirements on FEHBA contracts "can be expected to result" in "[i]ncreased premium costs to both the Government and enrollees, and [a] lack of uniformity of benefits for enrollees in the same plan which would result in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other States." H.R. Rep. No. 95-282, at 1, 4 (1977); *accord* S. Rep. No. 95-903, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1412, 1413.

Subsequently, Congress determined that this preemption provision was not a sufficient bulwark against the interference of

state law in the operation of the FEHBA program. Accordingly, in 1998, Congress expanded FEHBA's preemption provision by removing the final clause requiring that there be inconsistency between state law and FEHBA contract provisions in order for there to be preemption. The preemption provision now provides simply that FEHBA contract provisions "which relate to the nature or extent of coverage or benefits (including payments with respect to benefits)" shall preempt state law "which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1) (2000).

The amendment's purpose was to "confirm[ ] the intent of Congress that . . . FEHBA program contract terms which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) *completely displace* State or local law relating to health insurance or plans." H.R. Rep. No. 105-374, at 16 (1997) (J.A. A893) (emphasis added). Likewise, as already noted, Congress intended the amendment to "strengthen the ability of national plans to offer uniform benefits and rates" and to "strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts." *Id.*

The reimbursement provision in the Plan's Statement of Benefits preempts state law under this preemption clause. The reimbursement provision relates to the "extent of coverage or benefits (including payments with respect to benefits)" because it involves the return of *benefits payments* to the Plan. Absent reimbursement, the net benefits paid to an enrollee who subsequently collects from a third party would increase. In addition, state law used in the reimbursement context, whether it is a cause of action or a rule of decision, "relates to health insurance or plans," for it is being utilized to effectuate (when the Plan relies on state law) or to limit (when the enrollee relies on state law) a reimbursement requirement in an *insurance* arrangement or health *plan*. As such, the "state law claims refer to the plan, and therefore fall under the preemption clause."

Hayes v. Prudential Ins. Co., 819 F.2d 921, 926 (9th Cir. 1987).

The court of appeals rejected Empire's reading of the pre-emption provision, holding that it cannot apply to state laws of general application (such as contract law) not specifically targeted at health insurance or health plans. *See* Pet. App. 14a-23a. The court of appeals acknowledged that its construction was narrower than the interpretation this Court has given to a similar preemption provision in ERISA, which preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). For example, in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), this Court held that ERISA preempts state contract and tort doctrines invoked to obtain benefits, finding state law there to have a "connection with or reference to . . . a plan." *Id.* at 47 (internal quotation marks omitted); *see also id.* at 47-48 ("In particular we have emphasized that the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans.'") (quoting *Shaw v. Delta AirLines, Inc.*, 463 U.S. 85, 98 (1983)). Similarly, in *FMC Corp. v. Holliday*, 498 U.S. 52, 59-64 (1990), the Court interpreted the ERISA preemption provision to preempt state law subrogation doctrines.

Despite the nearly identical language in the two preemption provisions, the court of appeals stated that it was "reluctant to rely on ERISA-based precedent to justify an expansive interpretation of FEHBA's preemption provision." Pet. App. 19a. According to the court of appeals, "ERISA is significantly more comprehensive than FEHBA, in that it contains multiple preemption provisions and a detailed civil enforcement scheme." *Id.* But that is a misreading of the breadth of FEHBA's statutory and regulatory scheme: FEHBA regulates the plans it creates from cradle to grave and interposes a federal agency – OPM – to supervise all aspects of a carrier's administration of a plan. Furthermore, the court of appeals ignored that Congress was impelled to amend the FEHBA preemption

provision precisely because it was troubled by emerging court decisions holding that FEHBA's preemptive scope was narrower than ERISA's. As the Ninth Circuit explained in *Botsford v. Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390, 399 (9th Cir. 2002), "Congress amended the [FEHBA preemption] statute after numerous courts had found that FEHBA did not completely preempt state laws, but ERISA did. Thus, Congress replaced FEHBA's original preemption clause with ERISA's."

Perhaps most important, the court of appeals' decision produces the absurd result that state law plays a greater role in regulating the federal government's own health benefits plans than it does for private employer plans governed by ERISA. As the Seventh Circuit observed in *Cruz*, "if Congress intended to preempt state law when regulating private employers, it would be strange to leave regulation to the individual states when the employer is the United States itself." 396 F.3d at 799.

Because the effect of the FEHBA preemption provision is to "completely displace State or local law" (H.R. Rep. No. 105-374, at 16 (J.A. A893)), federal law fills the void and governs this lawsuit. Federal courts have the power "to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *accord Cruz*, 396 F.3d at 799-800. With state law preempted, and federal law filling the void, the district court had federal question jurisdiction over Empire's suit.

2. Federal Jurisdiction Exists Because Congress Intended that Federal Law Would Govern Suits to Enforce the Contracts Contemplated by FEHBA

Even without regard to the terms of the preemption clause, federal question jurisdiction exists here because this is a suit to enforce the terms of a government contract that Congress

contemplated would be governed by federal law. This Court long ago observed that disputes involving the "validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944), *overruled on other grounds, United States v. City of Detroit*, 355 U.S. 466 (1958). Hence, it is now settled that "obligations to and rights of the United States under its contracts are governed exclusively by federal law." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. at 592-94; *Priebe & Sons, Inc. v. United States*, 322 U.S. 407, 411 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943)).

This principle ordinarily comes into play in cases in which the government is a party, but the court of appeals erred in finding the principle automatically inapplicable when the government is not a party. To the contrary, this Court emphasized in *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15, 22 (1982), that "suits to enforce contracts contemplated by federal statutes may set forth federal claims and . . . private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." Indeed, federal jurisdiction can exist even where the contract is between two private parties; if the contract was specifically contemplated by federal statute, "the critical factor is the congressional intent behind the particular provision at issue." *Id.* Congress must intend that the contractual provisions "be creations of federal law" and that the "rights and duties contained in those contracts be federal in nature." *Id.* at 23 (internal quotation and citation omitted).

In *Jackson Transit*, which involved a collective bargaining agreement between a municipality and a labor union that was

contemplated by a federal funding statute, the Court concluded that state law governed the suit to enforce the contract. That conclusion was based on extensive, highly specific, legislative history that manifested Congress's clear intent that those collective bargaining agreements be governed by state law. *See id.* at 24-27. But this case stands in sharp contrast to *Jackson Transit*, and there can be little doubt that, as the United States itself argued in support of Empire on rehearing below, Congress intended FEHBA contract disputes to be governed by federal law.

Both the nature of the FEHBA contract and the subject of the lawsuit present a much stronger case here for the application of federal common law than did the contract dispute in *Jackson Transit*. While the contract in *Jackson Transit* was "contemplated" by federal statute, it was a contract between private parties. Here, although the court of appeals mistakenly characterized the contract at issue as "privately-negotiated" (Pet. App. 12a), the suit seeks to enforce a *government* contract between OPM and BCBSA. That contract was not merely "contemplated" by Congress; it and other FEHBA health benefits contracts are the essential components of the scheme created by FEHBA. Congress specified in detail in the statute what kind of contracts can be entered and the terms OPM can include in those contracts, making them "creations of federal law." *Jackson Transit*, 457 U.S. at 23; *see* 5 U.S.C. §§ 8902, 8903. Additionally, although the suit in *Jackson Transit* sought merely to vindicate a private plaintiff's rights, the suit here seeks to vindicate the rights of the United States, since it seeks funds to be returned to the Treasury under the reimbursement provision.

Empire's suit also satisfies *Jackson Transit*'s requirement that the "rights and duties contained in those contracts be federal in nature." *See* 457 U.S. at 23. The FEHBA program is purely a creation of federal law, designed to serve the interests of the federal government and its employees. FEHBA con-

tracts reflect the United States' strong interest in controlling the costs for providing health benefits to its employees and in ensuring that the level of benefits in a particular plan does not vary according to the state in which the employee resides. With respect to the reimbursement provision, the United States has an obvious interest in seeing that funds covered by that provision are returned to the U.S. Treasury. Thus, the nature of the contract at issue here is plainly federal, and FEHBA's broad preemption provision explicitly evinces Congress's intent that the contract be governed by federal law.

Indeed, even if Empire's suit rested on a state law cause of action, jurisdiction would still lie in the federal courts because the suit concerns enforcement of a federal contract that lies at the heart of an important federal program. As the Court recently reconfirmed in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363, 2367 (2005), "in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." If state law claims "turn on substantial questions of federal law, [the claims] justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* FEHBA is a federal program created by Congress that provides benefits solely to federal employees, annuitants, and their families. A substantial FEHBA contract issue embedded in a state law claim therefore belongs in federal court because its resolution there does not "disturb[ ] any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 2368.

3. Federal Jurisdiction Exists Because, Under *Boyle*, Federal Common Law Controls the Case

Still another basis for federal question jurisdiction derives from the analysis in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). This Court has held that "§ 1331 jurisdiction will support claims founded upon federal common law." *Illinois v. Milwaukee*, 406 U.S. 91, 100 (1972). *Boyle* articulates, in turn,

a two-part test for the creation of federal common law: first, the case must implicate "uniquely federal interests," *Boyle*, 487 U.S. at 504; second, there must be a "significant conflict" between "an identifiable federal policy or interest and the [operation] of state law" or the application of state law must "frustrate specific objectives of federal legislation." *Id.* at 507 (internal quotation marks and citations omitted).

Boyle was a diversity action involving the rights and liabilities of a federal government contractor, and the Court held that federal common law applied. The plaintiffs there sued the government contractor under state law for wrongful death, where a military aircraft manufactured by the contractor had crashed, killing the pilot. Applying the first part of the test, the Court held that the suit implicated uniquely federal interests, "even though the dispute is one between private parties." *Id.* at 506. "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture" the item as specified by the government or "it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507. With respect to the second part of the test, the Court found state law liability potentially in conflict with a policy embodied in the Federal Tort Claims Act shielding the government from liability when exercising discretionary functions, and the Court created a federal common law defense for the contractor insulating it from liability under similar circumstances.

Empire's suit here satisfies both parts of the *Boyle* test. On the first part, as Judge Sack's concurrence expressly acknowledges (Pet. App. 25a), suits for reimbursement involve uniquely federal interests. The carrier pursues such actions on behalf of the United States, in order to obtain funds inuring to the government's benefit. Indeed, the federal interest here is even stronger than in *Boyle*. Whereas in *Boyle* the uniquely federal interest was simply that the government might feel the

effects of any judgment because contractors may seek to "pass[] through" the costs of tort liability through future higher prices, the federal interest here ultimately is more concrete: the money at issue is directly credited to the Treasury and available, dollar for dollar, for the United States's use in connection with the Plan. *Boyle*, 487 U.S. at 511.

On the "conflict" prong of the analysis, the Court emphasized in *Boyle* that the conflict between the application of state law and federal policy "need not be as sharp" for the application of federal common law "as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.'" *Id.* at 507 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As the Court explained, the "fact that the area in question *is* one of uniquely federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Id.* at 508 (emphasis in original). The Court added that, "[i]n some cases, for example, where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules." *Id.*

In this case, there is the requisite conflict between federal objectives and the operation of state law. A central policy embodied in FEHBA is the need for uniformity in FEHBA-plan administration. Indeed, Congress's stated purpose for enacting both FEHBA's original preemption provision and the amendment in 1998 was to ensure uniformity in benefits and rates. Moreover, the OPM-BCBSA contract expressly states that the carrier shall subrogate under a "single, nation-wide policy" to ensure "equitable and consistent treatment for all Members." J.A. A140, A310. The application of state law poses an unavoidable conflict with the federal objective of uniformity. The Fourth Circuit cogently expressed this point when it upheld federal court jurisdiction over FEHBA disputes in *Caudill v. Blue Cross & Blue Shield of North Carolina, Inc.*, 999 F.2d 74, 79 (4th Cir. 1993): "As an employer, the federal

government has an overwhelming interest in ensuring that all of its employees subject to a particular health insurance policy are treated equally regardless of the state in which they live, and the application of state law interferes with this interest."

The court of appeals did not question that Empire's action involved uniquely federal interests. Nor did it dispute the federal goal of uniformity in FEHBA-plan administration. Rather, seizing on this Court's observation in a footnote in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n.8 (1995), that contract law is "not at its core diverse, nonuniform, and confusing," the court of appeals erroneously held that there is no conflict here between the federal objective of uniformity and the application of state contract law. However, because this case involves uniquely federal interests, the conflict necessary for the displacement of state law need not be as pronounced as would be required for preemption in areas where, as in *Wolens*, there typically is a heavy presumption against preemption. The court of appeals erred in resolving the conflict issue by reference to a statement in a preemption case like *Wolens*, where no uniquely federal interests were at issue.

In any event, it is not just state contract law that is relevant to reimbursement actions. State law on *subrogation* is undeniably diverse, with some states forbidding subrogation entirely. *See* Patricia G. Tobin, *The Rawlings & Assocs. National Subrogation Law Manual 1998*, at 51-53 (1997); *see also Cruz*, 396 F.3d at 796, 800-01 (Illinois common fund doctrine asserted as partial defense to reimbursement claim); *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994) (Minnesota "full-recovery rule" asserted as defense to reimbursement claim). Federal common law must govern a FEHBA carrier's action for reimbursement to ensure that divergent state rules on subrogation do not thwart the uniform administration Congress intended.

In sum, because FEHBA reimbursement is an area of uniquely federal concern and the operation of state law in

reimbursement disputes conflicts with the Congressional desire for uniformity, Empire has satisfied the *Boyle* test. Federal common law therefore controls the dispute, meaning that it raises a federal question.

D. The Court Should Resolve the Circuit Conflict by Granting Certiorari in This Case

As already noted, the court of appeals' decision in this case directly conflicts with the Seventh Circuit's decision in *Blue Cross & Blue Shield of Illinois v. Cruz*, 396 F.3d 793 (7th Cir. 2005), *petition for cert. filed*, No. 04-1657 (June 6, 2005). We believe that Empire's action presents a better vehicle for resolving the circuit conflict than does *Cruz* and, accordingly, submit that the Court should grant certiorari in this case rather than *Cruz* for the purpose of reviewing the issues.

The question whether federal jurisdiction exists over a carrier's suit to enforce the Plan's reimbursement terms is cleanly presented in this case. In *Cruz*, there are parallel state court proceedings that the *Cruz* petitioner insists complicate resolution of the federal case. Indeed, petitioner's "Questions Presented" in *Cruz* occupy an entire page and emphasize whether federal jurisdiction exists "where a state court action was already proceeding on the issue." Pet. for Writ of Cert., *Cruz*, No. 04-1657, at *i* (June 6, 2005). Although we believe the Seventh Circuit correctly ruled in *Cruz* that the parallel state court action does not affect federal jurisdiction, Empire's case avoids the issue altogether because it has no competing state court proceedings.

In addition, the Second Circuit decision portends greater mischief befalling the FEHBA program. The Seventh Circuit's *Cruz* opinion is a sparer decision, nowhere seeking to draw a distinction between laws of general and specific application for preemption purposes, nowhere questioning the constitutionality of FEHBA's preemption clause, and principally addressing only preemption as a basis for federal jurisdiction (and only briefly addressing *Boyle*). In light of the more numerous deci-

sional bases invoked by the Second Circuit, some of which might be deemed to remain intact even if the Court were to grant the petition in *Cruz* and affirm, the Court should review the Second Circuit's determination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2005

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: May 15, 2004 Decided: January 14, 2005)

Docket No. 03-3098

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross and Blue Shield,

Plaintiff-Appellant,

v.

DENISE FINN MCVEIGH, as administratrix of the Estate of Joseph E. McVeigh,

Defendant-Appellee.

Before: SACK, SOTOMAYOR and RAGGI, *Circuit Judges.*

Empire HealthChoice Assurance, Inc. ("Empire") appeals from a judgment entered in the United States District Court for the Southern District of New York (Cote, J.) dismissing for lack of subject matter jurisdiction Empire's claims against Denise Finn McVeigh for reimbursement of insurance benefits. Because the Federal Employees Health Benefits Act does not contain an affirmative grant of authority to federal courts to make federal common law, and

because there is no demonstrated conflict with state law that would require federal common-law rule-making in this case, we find that Empire's contract claims arise under state law.

AFFIRMED.

Judge Sack concurs in Judge Sotomayor's opinion and in a separate opinion. Judge Raggi dissents in a separate opinion.

SOTOMAYOR, *Circuit Judge*:

Empire HealthChoice Assurance, Inc. ("Empire") appeals from a judgment entered in the United States District Court for the Southern District of New York (Cote, J.) dismissing for lack of subject matter jurisdiction Empire's contract action against Denise McVeigh, as administratrix of Joseph McVeigh's estate, for reimbursement of insurance benefits. Because the Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901-8914, does not affirmatively authorize the creation of federal common law in this case, federal common-law rule-making is only appropriate if the operation of state law would "'significant[ly] conflict'" with "uniquely federal interest[s]." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507, 508 (1988). Because no such conflict has been demonstrated in this dispute, Empire's action arises under state, not federal, law. Accordingly, we affirm the district court's dismissal of the action for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1331; *Empire HealthChoice Assurance v. McVeigh*, No. 03 Civ. 2728, 2003 WL 22171693 (S.D.N.Y. Sept. 18, 2003).

BACKGROUND

The Federal Employees Health Benefits Act ("FEHBA") charges the United States Office of Personnel Management ("OPM") with negotiating and regulating health benefits plans for federal employees. *See* 5 U.S.C. § 8902(a). Pursuant to FEHBA, OPM entered into a contract in 1960 with the Blue Cross and Blue Shield Association

("BCBSA") to establish a nationwide fee-for-service health plan (the "Plan"), the terms of which are renegotiated annually.[1] Plaintiff-appellant Empire is the entity that administers the Plan to federal employees in New York State.

Defendant-Appellee Denise Finn McVeigh ("McVeigh") administers the estate of Joseph E. McVeigh ("Decedent"), a former enrollee in the Plan. The Decedent suffered injuries in an accident in 1997 and received $157,309.06 in benefits from the Plan between 1997 and 2001, the year of his death. McVeigh subsequently brought state tort actions on behalf of herself, the Decedent and a minor child against the parties who had allegedly caused Decedent's injuries. McVeigh received $3,175,000 when the lawsuit settled in 2003.

Prior to the entry of the settlement, Empire became aware of the agreement and notified McVeigh that it had a lien on the Decedent's share of the settlement for $157,309.06. McVeigh agreed to place $100,000 of the Decedent's share of the settlement funds into escrow pending resolution of Empire's claims.

On April 18, 2003, Empire filed suit against McVeigh for $157,309.06 in the United States District Court for the Southern District of New York. The complaint was based on a subrogation and reimbursement provision contained in the Statement of Benefits of the Plan. Under this provision, an enrollee who receives benefits in connection with an injury

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[1] The contract is negotiated between OPM and BCBSA. Federal employees like Joseph McVeigh do not enter into a contract for health benefits with BCBSA or any other Blue Cross and Blue Shield entity, but instead enroll in the Plan pursuant to the contract between BCBSA and OPM. While OPM is a party to the FEHBA contract, we emphasize that the dispute in this case is between two private parties: Empire and Denise Finn McVeigh.

in addition to compensation from a third party must reimburse the Plan the amount of benefits paid.[2] Empire's complaint alleged that McVeigh breached this provision and sought a judgment declaring that pursuant to the Plan, FEHBA, its regulations and federal common law, Empire was entitled to reimbursement from McVeigh for the amount of benefits paid for Decedent's injuries.

McVeigh moved for dismissal of the action on the grounds that, *inter alia*, the district court lacked subject matter jurisdiction. In response, Empire claimed that the court had jurisdiction under 28 U.S.C. § 1331 because federal common law governed its reimbursement claim. In the alternative, Empire argued that the Plan itself constituted federal law. District Court Judge Denise Cote rejected both of Empire's theories and granted McVeigh's motion to dismiss for lack of subject matter jurisdiction on September 18, 2003. *See Empire HealthChoice Assur.*, 2003 WL 22171693, at *3-*5.

DISCUSSION

A.

We review *de novo* a district court's legal conclusions with respect to its subject matter jurisdiction. *Gualandi v. Adams*,

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[2] The provision provides in relevant part:

> If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees.

385 F.3d 236, 240 (2d Cir. 2004). Empire claims that federal jurisdiction exists pursuant to 28 U.S.C. § 1331, which grants federal district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1331 jurisdiction -- that is, federal question jurisdiction -- "exists where a well-pleaded complaint 'establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25 (2d. Cir. 2000) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)); *see also Marcus v. AT&T Corp.*, 138 F.3d 46, 52 (2d Cir. 1998). Though the plaintiff is generally "the master of the complaint," *id.*, a plaintiff cannot create federal jurisdiction under § 1331 simply by alleging a federal claim where in reality none exists. *See Perpetual Securities, Inc. v. Tang*, 290 F.3d 132, 137 (2d Cir. 2002). Subject matter jurisdiction will lie only where the court determines that "'the substance of [the plaintiff's] allegations raises a federal question.'" *D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 100 (2d Cir. 2001) (emphasis omitted) (citation omitted). The existence of a federal question must be determined solely by reference to the plaintiff's own claim -- not by reference to "statements raised in anticipation or avoidance of possible defenses that may be interposed." *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 304 (2d Cir. 2004); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

FEHBA does not provide a federal statutory cause of action for insurance carriers to vindicate their rights under FEHBA-authorized contracts. Thus, federal jurisdiction exists over this dispute only if federal common law governs Empire's claims. *See Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999)

("It is beyond dispute that if federal common law governs a case, that case presents a federal question within the subject matter jurisdiction of the federal courts, just as if the case were governed by a federal statute."). The ability of federal courts to fashion federal common law, however, is "severely limited." *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001); *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (stating that the "cases in which judicial creation of a special federal rule would be justified . . . are . . . few and restricted" (citation and internal quotation marks omitted)). Absent congressional authorization, *see Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981), courts may only create federal common law where the operation of state law would (1) "'significant[ly] conflict'" with (2) "'uniquely federal interests,'" *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507, 508 (1988); *see also O'Melveny*, 512 U.S. at 87; *Woodward*, 164 F.3d at 127. These circumstances were present, for instance, in *Boyle*, where the Supreme Court held that federal common law provided a defense shielding a federal defense contractor from liability under state law for defective design. 487 U.S. at 509-12. The "state-imposed duty of care," the Court found, was "precisely contrary" to a duty imposed by the government contract. *Id.* at 509.

Empire argues that its contract dispute with McVeigh satisfies the "uniquely federal interests" prong of *Boyle*. Reimbursement, Empire explains, directly affects the United States Treasury and the cost of providing health benefits to federal employees. Moreover, Empire contends, Congress has expressed its interest in maintaining uniformity among the states with respect to the benefits of its health plans.

We need not address these arguments, because we find that regardless of the strength or importance of the federal interests at stake, Empire has failed to demonstrate that the operation of New York state law creates an "an actual,

significant conflict" with those interests. *Woodward*, 164 F.3d at 127; *see also id.* ("[I]n disputes between two private parties, federal courts . . . have shown a marked reluctance to displace state law by finding a significant conflict with a federal interest."). Tellingly, Empire's briefs on appeal fail to mention a single state law or state-imposed duty that runs contrary to the federal interests asserted in this case.

Because it cannot identify any way in which the operation of state law creates an actual conflict, Empire is left to speculate about the various harms that "might" result from state-by-state adjudication of suits brought by insurance carriers under FEHBA-authorized contracts. Empire argues, for example, that state law would undermine the federal interest in uniformity because enrollees in some states "might" successfully avoid reimbursement while others would have to repay. Empire also contends that uncertainties associated with the application of state law "might" reduce the source of funds available to defray overall costs of paying benefits. These speculations do not suffice to satisfy the conflict prong of *Boyle*. *See Woodward*, 164 F.3d at 127 ("[A]n actual, significant conflict between a federal interest and state law must be specifically shown, and not generally alleged." (internal quotation marks and citation omitted)).

The Fourth Circuit reached a different conclusion in *Caudill v. Blue Cross & Blue Shield of North Carolina, Inc.*, 999 F.2d 74 (4th Cir. 1993). The *Caudill* court found that the application of state law "would result in a patchwork quilt of benefits that varied from state to state under the same contract because of the vast differences in the common law of contracts from state to state." *Id.* at 79. Thus, the court held that the case presented a significant conflict between the federal interest in uniformity and state law. *Id.*; *see also id.* at 79 ("[T]he very application of state contract law would undermine the uniformity envisioned by Congress when it delegated the authority to interpret health benefit contracts to

OPM."). The *Caudill* court, however, cited no sources for its sweeping claim that "vast difference[s]" existed in the common law of contracts among the states. *Id.* The Supreme Court reached the opposite conclusion less than two years later in a dispute involving the Airline Deregulation Act of 1978. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n.8 (1995). In *Wolens*, the Court observed that "[b]ecause contract law is not at its core diverse, nonuniform, and confusing," there was "no large risk of nonuniform adjudication inherent in [s]tate-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide." *Id.* (second alteration in original) (internal quotation marks and citations omitted). In light of *Wolens*, we see no reason to *assume* as a general matter that a conflict necessarily exists between the operation of state contract law and the federal interests in uniformity underlying FEHBA. Because Empire has not demonstrated an "actual, significant" conflict between New York state law and the federal interests underlying FEHBA, *see Woodward*, 164 F.3d at 127, we hold that the dispute between Empire and McVeigh fails to satisfy the conflict prong of *Boyle*.

B.

We recognize the possibility that at a later stage in the proceedings, a significant conflict might arise between New York state law and the federal interests underlying FEHBA, such that the dispute would satisfy both prongs of *Boyle*. If, for example, McVeigh were to defend herself in reliance upon a state law that was meant to advance a particular state policy, Empire could argue that such state law—whether statutory or common law—conflicts with federal interests and requires the application of federal common law. This possibility, however, is insufficient to confer federal jurisdiction. *See Briarpatch Ltd.*, 373 F.3d at 304 ("The claims established by the well-pleaded complaint must

necessarily be determined from the plaintiff's statement of his or her own claim, *not including statements raised in anticipation or avoidance of possible defenses that may be interposed.*") (emphasis added); *see also Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2494 (2004); *City of Rome v. Verizon Communications Inc.*, 362 F.3d 168, 177 (2d Cir. 2004). Thus, it would be up to the state court to apply federal common law. *See Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507-508 & n.4 (1962) (stating that state courts are competent to enforce federal rights and noting that "[i]ndeed, Congress has so arranged the limited jurisdiction of federal courts that some federal laws can be enforced only in state courts." (citations omitted)); *see also Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) (holding that a state court exercising jurisdiction over suit arising from collective bargaining agreement must apply federal common law).

By finding that satisfaction of the two-prong *Boyle* test does not necessarily create federal jurisdiction under 28 U.S.C. § 1331, we again part ways with the Fourth Circuit's holding in *Caudill*. The *Caudill* court conflated the preemption and jurisdiction analyses by holding that a significant conflict with uniquely federal interests was sufficient to confer subject matter jurisdiction on the federal court.[3] *See* 999 F.2d at 78-79. We agree with the criticism *Caudill* has received for giving short shrift to the well-pleaded complaint rule. *See Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 314-15 (3d Cir. 1994) (rejecting *Caudill*'s reasoning); 15 James Wm. Moore, et al., *Moore's Federal Practice* § 103.45[3][c] (3d ed. 2004)

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[3] In *Boyle*, the Court did not refer to the well-pleaded complaint rule because jurisdiction was based on the parties' diversity. *See* 487 U.S. at 502.

(commenting that *Caudill* is "fatally flawed if the validity of the pleaded complaint rule . . . [is] accepted").[4]

C.

Empire also argues -- and our dissenting colleague agrees -- that federal jurisdiction exists pursuant to FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1).[5] Before explaining why we disagree, we discuss first a peculiar feature of § 8902(m)(1) which receives very little judicial attention. Though courts generally decide FEHBA cases as if § 8902(m)(1) were a preemption provision like any other, *see, e.g.*, *Hayes v. Prudential Ins. Co. of Am.*, 819 F.2d 921, 926 (9th Cir. 1987) (discussing earlier version of § 8902(m)); *Blue Cross & Blue Shield of Fla., Inc. v. Dep't of Banking and Fin.*, 791 F.2d 1501, 1504-05 (11th Cir. 1986) (same), the provision is in fact quite unusual, because it provides that certain types of *contract terms* will "supersede

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[4] Nothing in this analysis contravenes our decision in *Woodward*, 164 F.3d 123. *Woodward* did not go so far as to hold that satisfaction of *Boyle* provides federal question jurisdiction. Instead, it held that where the plaintiff fails to satisfy *Boyle* there is clearly no basis for federal question jurisdiction. There is nothing in the case that precludes us from clarifying that, even in cases in which *Boyle* is satisfied, courts must still ask the secondary question of whether the federal common law issue appears on the face of the plaintiff's well-pleaded complaint.

[5] Section 8902(m)(1) provides:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

and preempt" state laws in a particular field. 5 U.S.C. § 8902(m)(1). Normally, preemption clauses provide that federal *law* will preempt state law. A typical provision might provide for preemption, for example, by expressly stating that the statute's provisions preempt state law, *see, e.g.*, Employee Retirement Income Security Act (ERISA) § 514(a), 29 U.S.C. § 1144(a); 1976 Copyright Act § 301, 17 U.S.C. § 301(a), or by prohibiting state law from interfering with a policy established in federal law, *see, e.g.*, Communications Act § 253, 47 U.S.C. § 253. Regardless of a given provision's structure or wording, however, we generally take for granted that it is *law*, and not a mere contract term, that carries the preemptive force. *See generally Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 414-16 (2d Cir. 2002) (summarizing preemption doctrine).

Though § 8902(m)(1)'s plain language differs from typical preemption provisions by unambiguously providing for preemption by contract, such a literal reading of the provision is highly problematic, and probably unconstitutional, because only federal law may preempt state and local law. The constitutionality of federal preemption is, after all, grounded in the Supremacy Clause of the Constitution, which provides that "*the Laws of the United States* . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. (emphasis added); *see Sprint Spectrum*, 283 F.3d at 414-15 ("The foundation of preemption doctrines is the Supremacy Clause, which invalidates state laws that interfere with, or are contrary to, federal law." (citations, alterations and internal quotation marks omitted)). There is no constitutional basis for making the terms of contracts with private parties similarly "supreme" over state law. *See Arthur D. Little, Inc. v. Comm'r of Health and Hosps.*, 481 N.E.2d 441, 452 (Mass. 1985) ("[T]his court has been unable

to locate authority in this or any other jurisdiction which supports the proposition that a contract to which the Federal government is a party somehow constitutes Federal law for the purposes of the supremacy clause.").

Taken literally, therefore, FEHBA's preemption provision may fail to withstand constitutional scrutiny unless FEHBA-authorized contracts themselves are "Laws of the United States." They are not. "Law" connotes a policy imposed by the government, not a privately-negotiated contract. See *Wolens*, 513 U.S. at 229 n.5 (1995) (finding that "the word series 'law, rule, regulation, standard, or other provision'" as used in a federal statute "connotes official, government-imposed policies, not the terms of a private contract." (citation and internal quotation marks omitted)); *see also id.* at 241 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("To be sure, the terms of private contracts are not 'laws' . . . ."). Under FEHBA, the government does not impose contract terms as it would impose a law. Rather, the OPM negotiates the contract terms privately with insurance providers, *see generally Doe v. Devine*, 703 F.2d 1319, 1321-23 (D.C. Cir. 1983), who are under no obligation to enter into the contracts in the first place. *Cf. Evanns v. AT&T Corp.*, 229 F.3d 837, 840 n.9 (9th Cir. 2000) ("'[A] tariff, required by law to be filed, is not a mere contract. It is the law.'" (quoting *Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir.1966))); *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (distinguishing between laws and "mere contracts") (internal quotation marks and citation omitted). Empire's attempt to portray FEHBA contracts as "law" is unavailing.[6]

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[6] In arguing that the contract terms constitute law, Empire relies on *Marcus*, in which this Court found that federal tariffs filed by AT&T with the FCC were themselves federal law. See 138 F.3d

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The fact that a literal reading of § 8902(m)(1) raises serious constitutional problems does not, however, require us to invalidate the provision. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems," we may "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This canon of statutory construction, known as "constitutional avoidance," is grounded in "respect for Congress, which we assume legislates in the light of constitutional limitations." *United States v. Pettus*, 303 F.3d 480, 486 (2d Cir. 2002) (citation and internal quotation marks omitted). Here, we can reasonably construe § 8902(m)(1) as requiring that, in cases involving the "terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits," *federal law* "shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). This construction is as faithful as constitutionally possible to the provision's plain language and respects Congress's stated intent to maintain "uniformity" in FEHBA benefits and to "displace State or local law relating to health insurance or plans." H.R. Rep. No. 105-374, at 9, 16 (1997); see also S.

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at 56. *Marcus*, however, relied on an entire body of law standing for the proposition that "federal tariffs are the law, not mere contracts." Id. (citation and internal quotation marks omitted). There is no comparable case law surrounding FEHBA-authorized contracts. Moreover, AT&T was required by law to file the tariffs that were at issue in *Marcus*. This makes the tariffs fundamentally different from a FEHBA contract, which the government does not impose but rather negotiates with willing insurance companies.

Rep. No. 105-257, at 15 (1997). The federal law preempting state law may be federal common law or the FEHBA statute provisions themselves, but it must be law -- not contract terms.

D.

Turning to the effect of § 8902(m)(1) on the instant case, we disagree with the argument put forth by Empire and the dissent that the provision somehow authorizes by itself the exercise of federal jurisdiction. In our view, § 8902(m)(1), which makes no reference to a federal right of action or to federal jurisdiction, is simply a limited preemption clause that the instant dispute does not trigger.[7] Reading § 8902(m)(1) as conferring federal jurisdiction over contract disputes between private parties strains the language of the

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[7] Notably, FEHBA does contain a provision authorizing federal jurisdiction over FEHBA-related civil actions or claims "*against the United States*." 5 U.S.C. § 8912 (emphasis added). Of course, the grant of federal jurisdiction over one category of claims does not necessarily strip federal courts of their jurisdiction over another category of claims. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 643-44 (2002). Nevertheless, § 8912 does demonstrate that Congress considered jurisdictional issues in enacting FEHBA and did not hesitate expressly to confer federal jurisdiction where it found it necessary to do so.

The OPM has also moved to expand federal jurisdiction. As noted by our dissenting colleague, the OPM modified FEHBA regulations in 1995 to provide that legal actions seeking review of final action by the OPM for a denial of health benefits "must be brought against OPM and not against the carrier or carrier's subcontractors." 5 C.F.R. § 890.107. Read together with 5 U.S.C. § 8912, the new regulation ensures that suits brought by beneficiaries for denial of benefits will land in federal court. There is, however, no analogous regulation opening federal courts to insurance carriers seeking reimbursement from beneficiaries.

provision and undermines the presumption against federal preemption that should guide our analysis in this case. *See Gerosa v. Savasta & Co.*, Inc., 329 F.3d 317, 323 (2d Cir. 2003) (noting that there is an "assumption that Congress does not intend to supplant state law" (citation and internal quotation marks omitted)).

Two independent conditions must be satisfied in order to trigger preemption under § 8902(m)(1). First, preemption only occurs when the FEHBA contract terms at issue "relate to the nature, provision, or extent of coverage or benefits." 5 U.S.C. § 8902(m)(1). Second, federal law may only preempt state or local laws if those laws "relate[] to health insurance or plans."[8] *Id.* Empire completely ignores the existence of this second condition, arguing erroneously that because the contract provisions at issue relate to benefits, they necessarily supersede "all state law." Without any showing that the dispute implicates a specific state law or state common-law principle "relat[ing] to health insurance," § 8902(m)(1) does not authorize federal preemption of state law in this case.[9]

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[8] We agree with Empire that the District Court erroneously relied on a version of the preemption provision that is no longer in effect. *See Empire HealthChoice Assur.*, 2003 WL 22171693, at *3. Even applying the proper provision, however, Empire's argument fails.

[9] The suit will certainly trigger FEHBA's preemption provision at a later stage if McVeigh defends herself by reference, for example, to a state health insurance law. Such a possibility of preemption, however, is insufficient to establish federal jurisdiction. As discussed in Section B, *supra*, the well-pleaded complaint rule precludes a party from invoking federal jurisdiction merely because it anticipates a defense that will be preempted by federal law. *Briarpatch Ltd.*, 373 F.3d at 304; *see also Davila*, 124 S. Ct. at 2494; *City of Rome*, 362 F.3d at 177. If McVeigh does not defend in reliance upon some state law relating to health

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Judge Raggi argues in dissent that the case satisfies the second condition for § 8902(m)(1) preemption on the ground that the phrase "state or local law . . . which relates to health insurance or plans" encompasses laws of general application that make absolutely no reference to health insurance or plans but are used in a given case to "construe or enforce" FEHBA plans. *Post* at **[14]**. In our view, this reading of § 8902(m)(1), renders the second limiting condition meaningless. This is because *every* state or local law applied to a dispute satisfying the first condition (that is, every state law applied to a dispute involving a contract term relating to coverage or benefits) will ipso facto affect the construction or enforcement of that term. Thus, under the dissent's reasoning, FEHBA contract terms will preempt every state or local law so long as the first requirement is satisfied. This strips the second limiting condition of any force whatsoever.[10]

Judge Raggi contests this characterization of her analysis, explaining that under her interpretation, the second limiting condition might still impose meaningful limits on

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insurance, or in reliance on some state common law principle that would clearly run counter to federal policy, then state law could resolve whether McVeigh has breached her obligations. *See Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 71 (1966) (finding no authority to fashion federal common law where "there has been no showing that state law is not adequate to achieve" the federal interest).

[10] If Congress had not wished to limit the types of state laws subject to preemption, it could have quite easily provided that "federal law shall govern the interpretation and enforcement of contract terms under this chapter which relate to the nature, provision, or extent of coverage or benefits."

preemption "where general state or local law affects FEHBA coverage or benefits only tangentially, without attempting to construe or enforce those plan terms." *Post* at **[15]**. Even in such circumstances, however, the second limiting condition would likely have no meaning that is independent and distinct from the *first* limiting condition, which requires that the contract terms at issue specifically relate to health coverage in order for preemption to occur. 5 U.S.C. § 8902(m)(1). In other words, under the circumstances described by Judge Raggi, in which FEHBA coverage is only affected "tangentially," it is highly unlikely that *either* condition for § 8902(m)(1) preemption will be met. Thus, Judge Raggi's argument does not explain how the second limiting condition carries any independent meaning. Perhaps, under Judge Raggi's interpretation, the second condition might have independent meaning in a dispute that (1) centers on contract terms specifically relating to health coverage but (2) does not involve the enforcement or construction of those contract terms. We find it difficult, however, to imagine such a case.[11]

In defense of her position, Judge Raggi observes that many Supreme Court and Second Circuit cases construe the term

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[11] Judge Raggi's discussion of ERISA-related precedent on this point does not support her argument, because ERISA contains no provision that is analogous to the first limiting condition contained in 5 U.S.C. § 8902(m)(1). *See post* at **[15]** (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 841 (1988); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 660-661 (1995)); 29 U.S.C. § 1144(a). Thus, while the cases cited by Judge Raggi demonstrate that § 8902(m)(1)'s second condition, as she interprets it, might impose meaningful limits on preemption, they do not demonstrate that the second condition imposes any limits not already imposed by the first condition.

"relates to" quite broadly. *See post* at **[12-13]**. The cases she cites, however, are not directly applicable because they did not involve FEHBA. As this Court, our sister circuits and the Supreme Court have all recognized, the precise meaning of the vague term "relates to" depends on the larger statutory context. *See, e.g., Gerosa*, 329 F.3d at 323 (stating that "ERISA's nearly limitless 'relates to' language offers no meaningful guidelines to reviewing judges," and that we must therefore "'go beyond the unhelpful text . . . and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive'" (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995))); *Roach v. Mail Handlers Benefit Plan*, 298 F.3d 847, 850 (9th Cir. 2002) ("'[R]elates to' must be read in the context of the presumption that in fields of traditional state regulation the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress. Here, this means that we must presume that Congress did not intend [FEHBA] to preempt the quintessentially state-law standards of reasonable medical care, because § 8902(m)(1) does not indicate a clear and manifest intent to preempt this area of state law." (second and third alterations in original) (citations and internal quotation marks omitted)). The Supreme Court has specifically warned against overly-broad interpretations of the term, noting that "[i]f 'relate[s] to' were taken to extend to the furthest stretch of its indeterminancy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." *Travelers Ins. Co.*, 514 U.S. at 655 (citation and internal quotation marks omitted). To define "relate[s] to" so broadly "would be to read Congress's words of limitation as

mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Id.*[12]

We should be especially reluctant to rely on ERISA-based precedent to justify an expansive interpretation of FEHBA's preemption provision, given the fundamental differences between ERISA and FEHBA. ERISA is significantly more comprehensive than FEHBA, in that it contains multiple preemption provisions and a detailed civil enforcement scheme intended to completely supplant state law. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). The Supreme Court has relied heavily on ERISA's civil enforcement provisions, as well as those provisions' unambiguous legislative history, to support holdings that broadly construe ERISA's preemptive reach. *See Davila*, 124 S. Ct. at 2500 (stating that the Court's understanding of

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[12] Judge Raggi explains that "relate to" is "synonymous with the phrases 'in connection with,' 'associated with,' 'with respect to,' and 'with reference to.'" *Post* at **[12]**. The Supreme Court, however, has recognized the limited usefulness of such definitions. In *Travelers Insurance Co.*, a case involving ERISA, the Court wrote:

> [We must determine] whether the surcharge laws have a "connection with" the ERISA plans, and here an uncritical literalism is no more help than in trying to construe "relate to." For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

514 U.S. at 656.

ERISA's preemptive effect is informed by the "overpowering federal policy" embodied in ERISA's civil enforcement provision, which was intended to create "an exclusive federal remedy"); *Pilot Life*, 481 U.S. at 55 (quoting the ERISA Conference Report's statement that all suits to enforce benefits rights "are to be regarded as arising under the laws of the United States") (emphasis omitted); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (noting that ERISA's "deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern" (citation and internal quotation marks omitted)); *Pilot Life*, 481 U.S. at 46 (noting ERISA sponsors' emphasis on the "breadth and importance of [ERISA's] preemption provisions"). Given ERISA's comprehensive civil enforcement mechanisms and a legislative history "fully confirm[ing]" that ERISA's remedies were meant to be exclusive, *Pilot Life*, 481 U.S. at 54, we reject Empire's and Judge Raggi's suggestion that we should rely on ERISA-related precedent to determine the preemptive reach of FEHBA. *See Ingersoll-Rand Co.*, 498 U.S. 133; *Devlin v. Transp. Communications Int'l Union*, 173 F.3d 94, 98 (2d Cir. 1999).[13]

The non-ERISA cases on which Judge Raggi relies in her dissent similarly fail to justify the excessively broad interpretation of "relate to" that she favors. In *Coregis*

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[13] Furthermore, Judge Raggi may overstate the degree to which FEHBA's preemption provision is similar to ERISA's. In comparing the wording of the two provisions, Judge Raggi omits mention of the first limiting condition of 5 U.S.C. § 8902(m)(1), which requires that the preempting contract term "relate to . . . [health] coverage or benefits." *See post* at **[14]**. ERISA's provision contains no analogous requirement. *See* 29 U.S.C. § 1144(a); *see also* note 11, *supra*.

Insurance Co. v. American Health Foundation, Inc., 241 F.3d 123 (2d Cir. 2001), for example, the issue was whether certain lawsuits were "related to" a company's financial failure within the meaning of an insurance policy. We noted that the "[l]awsuits are related to the Companies' financial failure by the very wording of the complaints, which explicitly refer to, discuss, and seek redress for that failure." *Id.* at 131. In the instant case, neither Empire nor Judge Raggi has cited any state law that "explicitly refers to" or "discuss[es]" health insurance or plans. *Coregis*'s rationale therefore does not apply.[14]

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[14] Judge Raggi also cites *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995) and *Kamagate v. Ashcroft*, 335 F.3d 144 (2d Cir. 2004). *See post* at **[12]**. In interpreting the term "relate to" in *Celotex*, however, the Supreme Court did not have to contend with the general presumption against federal preemption. On the contrary, the Court analyzed the term with the understanding that "Congress intended to grant *comprehensive* jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with *all matters* connected with the bankruptcy estate." *Id.* at 308 (emphasis added) (citations and internal quotation marks omitted). *Kamagate* also fails to support Judge Raggi's argument because it involved a context in which Congress intended to give the term "relate to" an expansive meaning. *See Kamagate*, 385 F.3d at 154 ("Congress intended to give inclusive meaning in the immigration laws to the phrase 'relating to.'" (quoting *In re Beltran*, 20 I. & N. Dec. 521, 525-26 (B.I.A. 1992)).

The Eighth Circuit precedent discussed by Judge Raggi is also distinguishable, *see post* at **[19]**, because the case involved state law principles that were established in the context of health insurance and that were found to be inconsistent with FEHBA. *See MedCenters Health Care v. Ochs*, 26 F.3d 865, 866-67 (8th Cir. 1994) (citing *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983)).

To the extent we should rely on case law interpreting preemption provisions appearing in other statutes, we find *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), more relevant and more instructive. *Wolens* involved the Airline Deregulation Act (ADA), which bars states from "'enact[ing] or enforc[ing] any law relating to [air carrier] rates, routes, or services.'" *Id.* at 221-22 (quoting 49 U.S.C. App. § 1305(a)(1), now codified as amended at 49 U.S.C. 41713(b)). The plaintiffs in *Wolens* were airline customers who brought state law claims for consumer fraud and breach of contract after the airline retroactively took away their frequent flyer miles. The Supreme Court held that the consumer fraud claims, which were brought under a state statute, were preempted, but that the breach of contract action was not. The airline had argued that in passing the ADA, Congress provided that questions of the airline's rights and obligations would be matters of federal and not state law. The Court disagreed, stating:

> [It is not] plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services. The ADA contains no hint of such a role for the federal courts. In this regard, the ADA contrasts markedly with the ERISA, which does channel civil actions into the federal courts, under a comprehensive scheme detailed in the legislation, designed to promote prompt and fair claims settlement.

Id. at 232 (citation and internal quotation marks omitted).[15]

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[15] Judge Raggi correctly notes that the ADA, unlike ERISA and FEHBA, was aimed at encouraging competition rather than uniformity. *See post* at **[16-17]**. Nevertheless, in distinguishing

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Adopting this same reasoning, we do not believe that FEHBA reveals a congressional objective to resolve all manner of breach of contract suits relating to the Service Benefit Plan in federal court.[16]

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the ADA from ERISA, the *Wolens* court relied heavily on ERISA's civil enforcement scheme. 513 U.S. at 232. If this is the key factor distinguishing the ADA from ERISA, then FEHBA would seem to resemble the former more than the latter.

[16] Judge Raggi cites a House Report stating that the purpose of the 1998 FEHBA amendments was, in part, to "strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts" and to "completely displace State or local law relating to health insurance or plans." H.R. Rep. No. 105-374, at 9, 16 (1997); *see post* at **[11-12]**. Notably, the Report refers to displacing state and local law "*relating to health insurance or plans*," and not to generally applicable state law that may have an effect on benefits or coverage in some cases. *Id.* at 16. (emphasis added). As for the language that relates to bringing claims in federal court, it is something of a mystery what the authors of the report meant by "strengthen the case." This ambiguous wording seems to imply a recognition that the 1998 amendments did not guarantee federal jurisdiction. Given that (1) section 8902(m)(1) is by its plain and unambiguous terms a preemption provision and not a grant of jurisdiction, and (2) the legislative history provides only limited and equivocal support for a contrary conclusion, we do not find that the committee reports cited by Judge Raggi support her broad reading of § 8902(m)(1). *See Padilla v. Rumsfeld*, 352 F.3d 695, 718 (2d Cir. 2003) ("If the plain language is unambiguous, judicial inquiry ends, except in rare and exceptional circumstances, and legislative history is instructive only upon the most extraordinary showing of contrary intentions.") (citation and internal quotation marks omitted), *rev'd on other grounds*, 124 S. Ct. 2711 (2004). The 1998 amendments certainly do expand the preemptive reach of FEHBA, but §

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CONCLUSION

If Congress intended for this case to be heard in federal court, it could have created a private right of action for suits against FEHBA beneficiaries; it could have vested jurisdiction over these claims in the federal courts; or it could have included an affirmative grant of authority to the federal courts to create a body of federal common law. Congress did none of these things.

The preemption provision does not manifest an intent to supplant all state law with federal common law in cases involving FEHBA-authorized contract provisions. Section 8902(m)(1) plainly establishes that only state laws "relat[ing] to health insurance or plans" are subject to preemption. We decline Empire's suggestion that we read this phrase out of the provision. Moreover, even if federal law is likely to preempt McVeigh's defenses and thereby to affect the outcome of the case, this is insufficient to create federal jurisdiction. The well-pleaded complaint rule requires that the complaint itself arise under federal law in order for there to be federal jurisdiction. *See Briarpatch Ltd.*, 373 F.3d at 304. Empire's claims are breach-of-contract claims arising under state law. There is no indication that state law conflicts meaningfully with or is inadequate to achieve the federal interest in this case. Accordingly, we AFFIRM the district court's ruling that Empire's claims arise under state law.

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8902(m)(1) remains a preemption clause, not a grant of federal jurisdiction.

SACK, *Circuit Judge*, concurring:

I concur. I think, for the reasons elaborated by Judge Sotomayor in the principal opinion, that the *Boyle* test is applicable here and that Empire has failed to satisfy the second prong of that test because it has not demonstrated that there is a "significant conflict . . . between an identifiable federal policy or interest and the operation of state law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (citation and internal quotation marks omitted). I also agree with Judge Sotomayor's explanation as to why 5 U.S.C. § 8902(m)(1) does not itself authorize the exercise of federal jurisdiction over the cause of action asserted by Empire.

I write separately, though, simply to identify several issues that I think we do not decide.

First, Empire has made a substantial showing that the *first* part of the *Boyle* test has been met because this case implicates "uniquely federal interests," *id.* at 504 (citation and internal quotation marks omitted), in providing uniform healthcare coverage for federal employees and in decreasing the administrative costs associated with such insurance. It may well be that, as in *Boyle*, "the interests of the United States will be directly affected," *id.* at 507, by the outcome of this litigation and of litigation like it. It is Empire's inability to meet the *second*, "significant conflict," part of the test that leads me to join in Judge Sotomayor's opinion affirming the district court's dismissal for lack of subject matter jurisdiction.

Second, a future litigant in a similar action may, unlike Empire here, be able to point to specific ways in which the operation of state contract law, or indeed of other laws of general application, would conflict materially with the federal policies underlying FEHBA in the circumstances presented. In that case, presumably, the second part of the *Boyle* test would be met and, if that litigant's well-pleaded

complaint arises under federal law, a federal court would have subject matter jurisdiction.

Third, there is no need for us to decide what course to take if, "at a later stage in the proceedings, a significant conflict might arise between New York state law and the federal interests underlying FEHBA, such that the dispute would satisfy both prongs of *Boyle*." Opinion of Judge Sotomayor, Part B, ante at **[8]**. This portion of the opinion therefore does not seem to me to set forth a part of our holding on this appeal.

Fourth, and similarly, although I find Judge Sotomayor's discussion in Section C of the principal opinion of the proper reading of section 8902(m)(1) to be both interesting and persuasive, it is not necessary to our resolution of this appeal. It seems to me to be possible, notwithstanding that analysis, that the statute is *unavoidably* unconstitutional because contract terms are not "Laws of the United States," that are "the supreme Law of the Land." *Id.* at **[11]** (quoting U.S. Const. Art. VI, cl. 2). On the other hand, even if the statute does attempt to render contract terms "supreme" despite the fact that they are not strictly "law," perhaps the statute nonetheless would bear constitutional scrutiny. Still, in either case we must affirm because, for reasons spelled out largely in parts A and D of the principal opinion, the district court rightly ruled that it does not have subject matter jurisdiction under either *Boyle* or the statute as written. This discussion in the principal opinion, whatever its merits, therefore seems to me also to be dicta. It is possible that our views would turn out to be otherwise were we to confront a different situation in which this issue actually required our resolution. Should that day come, I do not think that the panel that considers the issue will be bound by our analysis here.

RAGGI, *Circuit Judge*, dissenting:

In this contract action, Plaintiff-Appellant Empire HealthChoice Assurance, Inc., sues Denise McVeigh, as administratrix of Joseph McVeigh's estate, for breach of the reimbursement provision of a federal employee health insurance plan that had covered her husband before his death.[17] The court today rules that this dispute cannot be heard in federal court for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1331. Specifically, it rejects Empire's argument that the case arises under federal common law, concluding that Empire fails to satisfy the "significant conflict" prong of the test established in *Boyle v. United Technologies*, 487 U.S. 500, 507 (1988) (holding that federal courts may create federal common law only where the operation of state law would (1) "significantly conflict" with (2) "uniquely federal interests"). I respectfully disagree. Congress has itself addressed the *Boyle* factors in its 1998 amendment to the preemption provision of the Federal Employees Health Care Protection Act ("FEHBA"), 5 U.S.C. § 8902(m)(1), thereby eliminating the need for courts to consider the question. Section 8902(m)(1) now states: "The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance of plans." 5

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[17] The statement of benefits for the plan applicable to this case contains the following reimbursement provision: "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse [the insurer] for benefits . . . paid." 2001 Statement of Benefits, at 86; *see also* 2000 Statement of Benefits, at 45; 1999 Statement of Benefits, at 12; 1998 Statement of Benefits, at 12; 1997 Statement of Benefits, at 12.

U.S.C. § 8902(m)(1). I conclude, for reasons discussed in this dissent, that this language requires courts to construe or enforce any term in a FEHBA plan that relates to health insurance coverage or benefits by reference to uniform federal common law, not state law.

I. Federal Question Jurisdiction

Under 28 U.S.C. § 1331, federal district courts have original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States." An action "arises under" federal law for purposes of § 1331 jurisdiction only when a plaintiff's well-pleaded complaint alleges a cause of action raising a federal question. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7 (2003); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Such a federal question is presented when the complaint invokes federal law as the basis for relief, *see Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.) (a "suit arises under the law that creates the cause of action"), or when a "substantial, disputed question of federal law is a necessary element of" a well-pleaded state-law claim, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983); *see also Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998).

Empire contends that § 1331 jurisdiction is proper in this case because federal common law governs all disputes involving the enforcement of FEHBA contracts. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (holding that § 1331 jurisdiction extends to causes of action governed by federal common law); Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc., 164 F.3d 123, 126 (2d Cir. 1999) (same). Alternatively, Empire argues that even if its claims do arise under state law, they are nevertheless properly heard in federal court because their resolution turns upon an interpretation of the operative Plan, which, Empire submits,

is itself federal law. Because I agree with Empire's first argument, I find it unnecessary to address the second.

II. Federal Common Law

As the majority observes, neither FEHBA nor its regulations expressly provide a federal cause of action for insurance carriers to vindicate their rights under FEHBA contracts. This does not mean that carriers are without a remedy for FEHBA-based disputes. Congress is understood to legislate against the pre-existing backdrop of the common law. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991); *United States v. Nucci*, 346 F.3d 419, 423 (2d Cir. 2004); see also *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 539 (1999) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." (internal quotation marks omitted)). It is an elementary common-law principle that a party to a valid contract is bound by its terms and is subject to suit for their enforcement. *See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607-08 (2000); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023, 1028 (2d Cir. 1991). *See generally* O.W. Holmes, *The Common Law* 227-40 (1881) (describing the characteristics of contracts). Nothing in FEHBA suggests that FEHBA contracts are to be treated differently. The Act does not, for example, provide a comprehensive remedial scheme that supplants a common-law action, *cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), nor does it contain an express provision precluding such an action, *see United States v. Nucci*, 364 F.3d at 423. Thus, it is reasonable to conclude that FEHBA contracts are enforceable through common-law

breach of contract actions. *See Jackson Transp. Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 20 (1982) (concluding that although the Urban Mass Transportation Act did not provide a cause of action to enforce contracts entered into pursuant to the Act, "it is reasonable to conclude that Congress expected [these contracts], like ordinary contracts, to be enforceable by private suit upon a breach").

That insurance carriers are able to bring breach of contract actions to vindicate FEHBA rights does not, however, mean that these actions are necessarily federal. The presumption, in fact, is to the contrary. As the Supreme Court declared in *Erie R.R. Co. v. Tompkins*, "there is no federal general common law." 304 U.S. 64, 78 (1938). Thus, contract actions are usually creatures of state law, *see Caceres Agency, Inc. v. Trans World Airways, Inc.*, 594 F.2d 932, 934 (2d Cir. 1979); *see also Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979), and, accordingly, absent diversity in citizenship among the parties, are ordinarily not subject to federal jurisdiction, *see Nolan v. Meyer*, 520 F.2d 1276, 1280 (2d Cir. 1975).

Since issuing *Erie*, however, the Supreme Court has made clear that federal common law displaces state law in certain narrow circumstances. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (decided the same day as *Erie* and declaring that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law'"). *See generally* Henry J. Friendly, *In Praise of Erie -- And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) (remarking on the various "specialized" categories of federal common law). Specifically, courts may fashion federal common law (1) when "Congress has given [them] the power" to do so,

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. at 640-41; or (2) if Congress has not granted such authorization, when (a) a case involves an area of "uniquely federal interests" and (b) the application of state law would "significantly conflict" with federal policies in this area, *Boyle v. United Techs.*, 487 U.S. at 507-08; *accord Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d at 127; *see also Atherton v. FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. at 87.

A. Empire's Reliance on *Boyle* to Invoke Federal Common Law

Empire relies on *Boyle v. United Technologies* to support its claim that this contract dispute arises under federal common law. Specifically, it urges this court to follow the Fourth Circuit's application of *Boyle* in *Caudill v. Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993). Although I do not think that *Boyle* analysis is necessary to reach this conclusion, I think it useful to begin with a brief discussion of Empire's *Caudill*-based argument.

In *Caudill*, Blue Cross had removed to federal court a state action filed by a FEHBA plan enrollee challenging Blue Cross's denial of benefits.[18] Noting that federal removal

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[18] It is worth noting that at the time Caudill filed his state court action, OPM regulations provided that "litigation to recover on [a FEHBA benefits] claim should be brought against the carrier, not against OPM." 5 C.F.R. § 890.107 (1994). On March 29, 1995, however, OPM amended the regulation to bring virtually all benefit claims by beneficiaries into federal courts: "A legal action to review final action by OPM involving such denial of health benefits must be brought against OPM and not against the carrier or carrier's subcontractors." 5 C.F.R. § 890.107(c); 60 Fed. Reg. 16,037, 16,039 (March 19, 1995) (interim rule); 61 Fed. Reg. 15,177 (April 5, 1996) (final rule); *see also* 5 U.S.C. § 8912 (providing that "[t]he district courts of the United States have

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jurisdiction is limited to state court actions "of which the district courts of the United States have original jurisdiction," 28 U.S.C. § 1441, the Fourth Circuit ruled that removal was proper because Caudill's claim, although pleaded under state law, actually arose under federal common law. *See Caudill v. Blue Cross & Blue Shield of North Carolina*, 999 F.2d at 77. Applying the *Boyle* standard, the court found that (1) Caudill's claim implicated unique federal interests because, if her suit were successful, it would hinder OPM's ability to enter into future FEHBA contracts and might result in costs being passed through to the federal government, and (2) the use of state law would undermine the federal interest in ensuring that federal employees receive uniform health benefits. *See id.* at 78-79. The latter interest in uniform treatment of enrollees was evinced, the court explained, by FEHBA's preemption provision, which, at that time, stated that "[t]he provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits . . . shall supersede and preempt any State or local law . . . which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions." 5 U.S.C. § 8902(m)(1) (1997).

As the majority notes, *Caudill* has been criticized by courts and commentators. That criticism, however, is not leveled at its conclusion that federal common law governs FEHBA claims, but at its failure to adhere to the well-pleaded complaint rule. *See Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 314-15 (3d Cir. 1994); *see also* 15 James Wm. Moore et al., *Moore's Federal Practice*

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original jurisdiction . . . of a civil action or claim against the United States founded on [FEHBA]").

§ 103.45[3][c] (3d ed. 1997) (commenting that Caudill's holding "is fatally flawed if the validity of the well-pleaded complaint rule . . . [is] accepted"). The criticism is not without force. Under the well-pleaded complaint rule, a plaintiff, as master of his claim, may avoid federal jurisdiction by relying exclusively on state law in his complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. at 392. It appears that Caudill's complaint pleaded claims under only state law, *see Caudill*, 999 F.2d at 77, and, thus, on its face, presented no federal claim justifying removal. Although Blue Cross's contention that federal common law governed Caudill's state claims may have provided the insurer with a federal defense to the claims that it could raise in the state action, this was not a ground for the removal of those state claims to federal court. *See Caterpillar Inc. v. Williams*, 482 U.S. at 393.

Thus it appears that in *Caudill*, removal would have been proper only if Blue Cross had demonstrated that plaintiff's state claims were "completely preempted" by federal law. *City of Rome v. Verizon Communications, Inc.*, 362 F.3d 168, 176-77 (2d Cir. 2004). "[C]omplete preemption" occurs when Congress manifests its intent that federal law displace state law by enacting a "federal statute [that] . . . provide[s] the exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action"; in such cases, the claim, although pleaded in terms of state law, actually arises under federal law. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. at 8; *City of Rome v. Verizon Communications, Inc.*, 362 F.3d at 177. As the Third Circuit has pointed out, however, FEHBA did not provide a cause of action to vindicate the rights at issue in Caudill's state-law claims. *See Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d at 315. Thus, by finding removal proper, the Caudill court implicitly extended the complete preemption doctrine to claims that arise under

federal common law but for which Congress has not manifested an intent to provide an exclusive cause of action. *See id.* at 314-15 (criticizing *Caudill* for expanding the complete preemption doctrine).

In this case, unlike in *Caudill*, the propriety of applying federal common law does not depend on complete preemption. Empire's complaint does not plead claims in terms of state law; rather, it relies exclusively upon federal law. Thus, this court need not decide whether a state-law claim to enforce the terms of a FEHBA plan may be recharacterized as arising under federal law. It need decide only whether federal common law does in fact govern claims to enforce rights under a FEHBA plan. If it does, then this case arises under federal law and the district court had jurisdiction to hear it.

I conclude that federal common law does govern the parties' dispute in this case, but I do not rely on *Boyle*. Instead, I conclude that in amending § 8902(m)(1) in 1998, Congress itself addressed the *Boyle* factors, making the analysis undertaken in *Caudill* unnecessary. The amendment necessarily grants courts the power to develop uniform federal common law to construe and enforce the coverage and benefit terms of FEHBA plans.

B. Congressional Authorization in § 8902(m)(1) for Federal Common Law to Construe and Enforce FEHBA Plans

In 1998, Congress amended FEHBA's preemption provision by striking the clause alluded to in *Caudill*, providing for preemption of state laws only "to the extent [they are] inconsistent with" a contractual term, see Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366 (1998), and enacting a more expansive provision that reads in full: "The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including

payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1).

The amendment thus effectively legislates both *Boyle* factors. First, by providing for FEHBA coverage and benefits terms to "supersede" certain state and local laws, Congress has identified a unique federal interest in ensuring national uniformity in the construction and enforcement of such terms. Second, by amending § 8902(m)(1) to eliminate the need for any judicial finding of conflict between contract terms and certain state and local laws, Congress has implicitly authorized courts to employ federal common law to resolve disputes concerning coverage and benefits, even in the absence of the conflict generally required by *Boyle*.

As the majority observes, a literal reading of § 8902(m)(1) could give rise to constitutional concerns. The Supremacy Clause makes plain that the terms of a federal contract cannot by themselves preempt state law; only federal law can preempt state law. *See* U.S. Const. Art. VI, cl. 2. Because courts assume that Congress legislates in light of constitutional limitations, *see Rust v. Sullivan*, 500 U.S. 173, 191 (1991), however, it is reasonable to conclude that the operation of federal law is necessarily implicit in § 8902(m)(1), *see generally Edward J. Bartolo Corp. v. Florida Gulf Coast Bldg. Constr. Trades Council*, 485 U.S. 568, 575 (1988) (noting that where "an otherwise acceptable construction" of a statute is available that is not "plainly contrary to the intent of Congress," courts may adopt that construction to avoid serious constitutional doubts); *accord Jones v. United States*, 526 U.S. 227, 239-40 (1999). Mindful of this principle, I read § 8902(m)(1) to mean that any terms in a FEHBA plan that relate to coverage or benefits are to be construed according to uniform federal

law, and that *law* will, in turn, supersede any state or local law that relates to health insurance or health plans.

My colleagues in the majority apparently agree that the application of federal law is implicit in § 8902(m)(1)'s preemption of certain state laws. Where we disagree is in our assessment of whether that preemption is limited to laws specifically addressing "health insurance or plans," or whether it also extends to general state and local law, including contract law, when an action is brought to construe and enforce a coverage or benefits term in a FEHBA health insurance plan. I conclude that such actions necessarily arise under federal common law because § 8902(m)(1) precludes any state law, including contract law, from construing or enforcing the coverage or benefit terms of FEHBA plans. When the application of state contract law would have that effect, the law "relates to health insurance or plans."

Unlike its predecessor, which limited preemption to state laws that actually *conflicted* with the terms of a FEHBA contract, the 1998 amendment to § 8902(m)(1) precludes state laws that relate to health insurance or plans from playing any role in construing such coverage or benefits terms. *See Botsford v. Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390, 393-94 (9th Cir. 2002); *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) (when Congress deletes limiting language, "it may be presumed that the limitation was not intended"). While this amendment, on its face, indicates Congress's intent significantly to expand § 8902(m)(1) preemption, a House Report confirms the breadth of the new provision, explaining that the amendment was intended "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they live" and to "strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts." by "completely displac[ing] State or local law relating to health insurance or plans." H.R. Rep. No. 105-

374, at 9, 16 (1997); *see also* S. Rep. No. 105-257, at 15 (1997) (amendment "removes the language dealing with inconsistencies, thereby giving the federal contract provisions clear authority").

Although FEHBA does not define what it means for a state or local law to "relate[] to health insurance or plans," the Supreme Court has, in other contexts, recognized that the common meaning of the phrase "relate to" is expansive: "'to stand in some relation; to have bearing or concern, to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)) (discussing the phrase "relating to" in the context of the Airline Deregulation Act of 1978). Our court has also concluded that the phrase does not imply a causal connection; rather, it is synonymous with the phrases "in connection with," "associated with," "with respect to," and "with reference to." *Coregis Ins. Co. v. American Health Found.*, Inc., 241 F.3d 123, 128-29 (2d Cir. 2001) (interpreting insurance contract); *accord Kamagate v. Ashcroft*, 385 F.3d 144, 154 (2d Cir. 2004) (applying broad definition to removal statute); *see Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (applying same definition in ERISA context); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995) (stating that proceedings "related to" a bankruptcy include "suits between third parties which have an effect on the bankruptcy estate").

In the ERISA context, the Supreme Court has ruled that "[u]nder this 'broad common-sense meaning,' a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 139 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987)). Recognizing the potential all-encompassing breadth of this definition, the

Court has increasingly focused on ERISA's objective to establish a uniform system of benefits in determining whether a particular state law "relates to" a plan. In light of this federal interest in uniformity, the Court has concluded that a state law of general application "relates to" an ERISA plan where application of the different states' laws could yield inconsistent benefit outcomes in similar cases. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995) ("[L]aws providing alternative enforcement mechanisms also relate to ERISA plans . . . ."); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 139. Following these decisions, our court has concluded that ERISA preempts generally applicable state contract law when that law is relied upon to enforce a benefits plan. *See Devlin v. Transp. Communications Int'l Union*, 173 F.3d 94, 101 (2d Cir. 1999).

This precedent supports the conclusion that FEHBA preemption is not limited to state and local laws that expressly regulate health insurance or plans.[19] Nor is it limited to specialized state rules applicable only to insurance plans, for example, a rule of decision providing for ambiguities in an insurance policy to be resolved in favor of the insured. *See, e.g., City of Burlington v. Indemnity Ins. Co. of N. Am.*, 332 F.3d 38, 45 (2d 9 Cir. 2003); *Mostow v. State Farm Ins. Cos.*, 88 N.Y.2d 321, 326, 645 N.Y.S.2d

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[19] Where Congress has intended to limit preemption to laws specifically regulating particular conduct, it has so indicated. *See, e.g.*, 7 U.S.C. § 27f(c) (limiting preemption to state laws that "prohibit[ ] or regulate[ ] gaming or the operation of bucket shops" in certain contexts); 8 U.S.C. § 1188(h)(2) (limiting preemption to state or local laws "regulating admissibility of nonimmigrant workers").

421, 423 (1996). Rather, FEHBA preemption also extends to general laws that can reasonably be understood to "relate to health . . . plans" whenever such laws would attempt to construe or enforce the coverage or benefits terms of FEHBA health plans.

The majority concludes that ERISA precedent is not helpful in determining the preemptive reach of § 8902(m)(1). Certainly, ERISA is a more comprehensive remedial statute than FEHBA, but that does not warrant a different conclusion with respect to preemption. The statutes' preemption clauses are notably similar. ERISA preemption applies to "any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan* described in [the statute]." 29 U.S.C. § 1144(a) (emphasis added). FEHBA preemption applies to "any State or local law, or any regulation issued thereunder, *which relates to health insurance or plans*." 5 U.S.C. § 8902(m)(1) (emphasis added). More important, the objectives of the two laws are virtually identical. FEHBA -- in particular, its amended preemption provision -- is designed "to offer uniform benefits" to tens of thousands of federal employees across the nation. H.R. Rep. No. 105-374, at 9.

The majority suggests that construing § 8902(m)(1) to apply to state contract law renders meaningless the statute's limitation of federal preemption to state or local law that "relates to health insurance or plans." I cannot agree. Here again, ERISA precedent is instructive in distinguishing between generally applicable state laws that "relate to" health plans and laws that tangentially implicate such plans without relating to them. For example, in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 841 (1988), the Supreme Court concluded that ERISA preemption of state laws that "relate to any employee benefit plan" did not extend to a state's garnishment statute, even though the garnishment would operate on ERISA benefits. In that case,

state law did not attempt to construe the benefits afforded under an ERISA plan; it merely authorized the garnishment of whatever benefits were payable thereunder. Similarly, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. at 660-61, the Court noted that generally applicable state quality control and workplace regulations may tangentially affect what benefits an ERISA plan will be able to afford, but they do not attempt to construe the benefits provided by any particular plan. Application of these decisions to this case suggests that where a state law of general application would be employed to construe the rights enforceable under the coverage or benefits terms of a FEHBA plan, such a law "relates to health insurance or plans" and is properly preempted by federal law. But where general state or local law affects FEHBA coverage or benefits only tangentially, without attempting to construe or enforce those plan terms, preemption may not be warranted. Put another way, § 8902(m)(1) contemplates that the coverage and benefits terms of FEHBA plans will always be construed only by reference to uniform federal common law. That law will then preempt any state or local laws that relate to health insurance or plans, both (1) laws specifically denominated as such and (2) general laws that are fairly deemed to "relate[] to health insurance or plans" in those cases where such laws would attempt to construe the coverage or benefits terms of such a plan.

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995), is not to the contrary. The question in that case was whether the Airline Deregulation Act's preemption clause, which forbids states from enacting or enforcing "any law . . . relating to [air carrier] rates, routes, or services," 49 U.S.C. App. § 1305(a)(1) (1993) (now codified with technical changes at 49 U.S.C. § 41713), preempts a state law contract action to enforce rates, routes, and services set forth in an agreement

between private parties. The Supreme Court said the answer was no. *Wolens*, 513 U.S. at 228-29. It explained that the Deregulation Act preempted only state-imposed, as opposed to privately contracted-for, rates, routes, and services. Moreover, the purpose of the Deregulation Act was to encourage competition in these areas, which anticipated a variety of private contractual arrangements. In this context, the Court observed that it was not "plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." *Id.* at 232. In so ruling, the Court specifically distinguished the Deregulation Act from ERISA. *See id.* (noting that ERISA "does channel civil actions into federal court . . . under a comprehensive scheme . . . to promote prompt and fair claims settlement" (internal citations omitted)). Precisely because ERISA's objective is uniformity rather than competition, it makes sense to conclude that Congress intended contract claims arising under that statute to be reviewed according to a single national legal standard.

The same conclusion obtains as to FEHBA. The 1995 amendment to 5 C.F.R. § 890.107 channels the vast majority of benefits claims -- those by plan beneficiaries -- into federal court. *See* 5 C.F.R. § 890.107(c). As for any remaining FEHBA actions, Congress's expectation when it amended 5 U.S.C. § 8902(m)(1) in 1998 was to "strengthen the case for trying FEHB program disputes in Federal courts rather than state courts." H.R. Rep. No. 105-374, at 9, 16. Further, as already discussed, FEHBA's preemption provision and its uniformity objective have more in common with ERISA than with the Deregulation Act in signaling Congress's intent to have the coverage and benefits terms of FEHBA health insurance plans construed according to uniform federal common law. FEHBA does not simply bar

states from enacting laws with respect to the coverage and benefit terms of federal health plans. It contemplates that the coverage and benefits terms of FEHBA plans will themselves supersede any state laws that relate to health insurance or health plans, something possible under the Supremacy Clause only if the construction and enforcement of those plan terms are the exclusive province of federal common law.

I recognize that in *Wolens* the Supreme Court observed that "contract law is not at its core 'diverse, nonuniform, and confusing.'" 513 U.S. at 233 n.8 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion)). Thus, the Court anticipated no serious risk of nonuniform adjudication in the enforcement of a nationwide contract by the various states. The amendment to § 8902(m)(1), however, makes plain that Congress was not limiting FEHBA preemption to state laws that might conflict with the terms of federal-employee health plans. Rather, Congress has made clear that it deems any state laws relating to health insurance or health plans, even those that are consistent with federal law, as an obstacle to the uniform construction and enforcement of FEHBA plans. *Cf. Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 139 ("Preemption is also not precluded simply because a state law is consistent with ERISA's substantive requirements.").

Here, Empire seeks to enforce a FEHBA plan term that expressly conditions the receipt of benefits on an enrollee's duty to reimburse the insurer if he recovers in tort from the third party causing his injuries. Because the operative Plan's reimbursement requirement plainly "relates to" the provision of insurance benefits, I conclude that under the broad preemption provision of § 8902(m)(1), Empire cannot look to state contract law to construe or enforce its rights. *See Hayes v. Prudential Ins. Co. of Am.*, 819 F.2d 921, 926 (9th Cir. 1987) (holding that state law contract and tort claims,

which expanded obligations under the terms of a FEHBA plan, were preempted under the earlier version of § 8902(m)(1)). In that context, state contract law qualifies as a law that "relates to health insurance or plans," which is necessarily preempted by federal common law construing FEHBA coverage and benefits terms.

The 1998 amendment to § 8902(m)(1) was surely not designed to expand federal preemption of state law in order to leave insurance carriers without any means to enforce their rights under FEHBA plans. For reasons already discussed, I assume that Congress intended FEHBA contracts to be enforceable. *See Jackson Transp. Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. at 20. Because I conclude that Congress expressly proscribed the use of state contract law to construe rights relating to FEHBA benefits or coverage, it logically follows that Congress was thereby authorizing courts to look to federal common law both to construe those rights uniformly and to resolve insurance carriers' FEHBA claims. *See, e.g., Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998) (stating that when a statute recognizes rights but fails to provide necessary principles for their enforcement, courts must "fill the interstices of the Act by developing federal common law").

This conclusion is consistent with *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994). Relying on the pre-1998 preemption provision of FEHBA, the Eighth Circuit rejected a jurisdictional challenge to a FEHBA carrier's contract claim for restitution, holding that federal law governs such claims. Although the decision is brief, I can only assume that its respected author, Judge Richard Arnold, thought it so obvious that Congress had authorized federal common law to resolve FEHBA coverage or benefits disputes that the point merited little discussion. *See also Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572 (11th Cir.

1985) (citing FEHBA's former preemption provision for proposition that federal law controls interpretation of FEHBA contracts). *Cf. Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d at 309 n.3, 315 (recognizing that FEHBA claims may be governed by federal common law, but declining to reach the issue).

In sum, because (1) Empire's contract action seeks to enforce the benefits terms of a FEHBA plan; (2) § 8902(m)(1) contemplates that such benefits terms will uniformly be construed and enforced according to federal common law; and (3) any state law, including contract law, invoked to construe and enforce such benefits terms qualifies as a law that "relates to health insurance or plans" preempted by federal common law, I conclude that Empire's action is a case arising under federal common law over which the district court could properly exercise jurisdiction.

C. The Effect of 5 U.S.C. § 8912 on Federal Jurisdiction in this Case

Ms. McVeigh insists that, even if Empire's claims arise under federal common law, the district court cannot exercise § 1331 jurisdiction over them because federal jurisdiction over FEHBA claims is limited to that expressly conferred in 5 U.S.C. § 8912 (vesting federal courts with "original jurisdiction . . . of a civil action or claim against the United States founded on" FEHBA). Because the majority concludes that Empire's claims do not arise under federal common law, it does not reach this issue. Because I reach a different conclusion with respect to the application of federal common law, I write briefly to explain why I reject Ms. McVeigh's § 8912 argument.

Absent some indication to the contrary, statutes vesting courts with jurisdiction over certain matters do not strip courts of their jurisdiction over others. As the Supreme Court stated in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, "[t]he mere fact that some acts are

made reviewable [under a statute] should not suffice to support an implication of exclusion as to others." 535 U.S. 635, 643-44 (2002) (internal quotation marks omitted). Section 8912 does not purport to deprive federal courts of § 1331 jurisdiction. It simply authorizes federal jurisdiction over FEHBA claims against the United States. *See Rice v. Office of Servicemembers' Group Life Ins.*, 260 F.3d 1240, 1244-46 (10th Cir. 2001) (holding that 38 U.S.C. § 1975, which grants district courts "original jurisdiction of any civil action or claim against the United States founded upon [the Servicemen's Group Life Insurance Act (SGLIA)]," does not preclude § 1331 jurisdiction of SGLIA suits against parties other than the United States). Indeed, without the provision, sovereign immunity would bar such claims. *See Adeleke v. United States*, 355 F.3d 144, 150 (2d Cir. 2004). But nothing in § 8912 evinces Congress's intent to limit § 1331's jurisdictional grant in FEHBA cases involving parties other than the United States.

For all these reasons, I conclude that this suit to enforce the terms of a FEHBA plan does arise under federal common law, and I dissent from the majority's conclusion that the case was properly dismissed for lack of subject matter jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004

[Petition for rehearing filed: January 28, 2005]

[Decided: March 16, 2005]

Docket No. 03-9098

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross and Blue Shield,

Plaintiff-Appellant,

v.

DENISE FINN MCVEIGH, as administratrix of the Estate of Joseph E. McVeigh,

Defendant-Appellee.

Before: SACK, SOTOMAYOR and RAGGI, *Circuit Judges*.

ON PETITION FOR REHEARING BY THE PANEL

SOTOMAYOR, *Circuit Judge*:

Appellant Empire HealthChoice Assurance, Inc. ("Empire") petitions the panel for rehearing to reconsider its decision in *Empire HealthChoice Assurance, Inc. v.*

McVeigh, 396 F.3d 136 (2d Cir. 2005). The Association of Federal Health Organizations ("AFHO") and the United States have each submitted briefs as amicus curiae in support of Empire's petition. We assume familiarity with our original decision and its underlying facts. Because Empire and its amici have failed to demonstrate "point[s] of law or fact that . . . the court has overlooked or misapprehended," the petition is denied. Fed. R. App. P. 40(a); *see Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 386 (2d Cir. 1980).

Empire contends that our original decision improperly disregarded the principle "that suits to determine the rights of the United States under its contracts are governed by federal common law." Appellant's Petition for Rehearing and Rehearing En Banc at 8. This argument misses the point, however, because Empire has not brought suit to determine the rights of the United States. Rather, Empire seeks to vindicate its own rights against another private party. This distinguishes the instant case from the precedents cited by Empire, which involved suits to which the United States was itself a party.[1] *See United States v. Seckinger*, 397 U.S. 203 (1970); *United States v. County of Allegheny*, 322 U.S. 174 (1944), *abrogated on other grounds by United States v. City of Detroit*, 355 U.S. 466 (1958); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Up State Fed. Credit Union v. Walker*, 198 F.3d 372 (2d Cir. 1999).[2] A monetary

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[1] For substantially the same reasons, we reject the AFHO brief's suggestion that Empire has brought suit "to vindicate [the] rights . . . of the federal government." Brief of the Association of Federal Health Organizations at 6.

[2] Empire also relies on *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Our previously issued opinion, however, already provides a comprehensive explanation of why *Boyle* does not establish that we have jurisdiction over Empire's claims.

recovery by Empire might benefit the United States, but this is insufficient to require displacement of state law. *See Boyle v. United Techs. Corp*, 487 U.S. 500, 507 (1988); *Empire*, 396 F.3d at 140-42.[3]

Building on Empire's argument, the government argues that "suits to enforce contracts 'contemplated by federal statutes'" such as the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914, state a federal claim if "Congress intended that the contracts be 'creations of federal law' and that 'the rights and duties contained in those contracts be federal in nature.'" Brief of the United States at 8-9 (quoting *Jackson Trans. Auth. v. Local Div. 1285*, 457 U.S. 15, 22-23 (1982)). In *Jackson Transit*, the Supreme Court held that "suits to enforce contracts contemplated by federal statutes *may* set forth federal claims," and that "private parties *in appropriate cases* may sue in federal court to enforce contractual rights created by federal statutes." 457 U.S. at 22 (emphasis added). The "critical factor" in determining "the scope of rights and remedies under a federal statute," the Court held, was "congressional intent." *Id.* at 22-23. In the instant case, the "critical factor" of congressional intent is embodied in FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1), which addresses the extent to which federal law will govern FEHBA-related claims.

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[3] In an attempt to remedy its earlier failure to satisfy the "conflict" prong of *Boyle*, Empire's petition for rehearing cites to a responsive pleading filed by McVeigh in the district court that had relied on a New York State statute of limitations. Empire did not raise this argument in its briefs on appeal, however, and we therefore will not consider it. *See Anderson v. Branen*, 27 F.3d 29, 30 (2d Cir. 1994) (per curiam). In any event, the argument could not have made a difference under the original opinion's analysis, as Empire concedes.

For reasons explained in Part D of the panel's original majority opinion, *see Empire*, 396 F.3d at 145-49, that preemption provision, while broad, does not confer federal jurisdiction over Empire's claims. *See also Miree v. DeKalb County*, 433 U.S. 25, 26-30 (1977) (holding that state law, rather than federal common law, controlled a dispute where "only the rights of private litigants [were] at issue," even though the dispute required interpretation of a federal contract and implicated federal operations "of considerable magnitude").[4]

Misconstruing Part C of our principal opinion, Empire takes particular issue with what it regards as the panel's conclusion that § 8902(m)(1) is unconstitutional. We held no such thing. Instead, we interpreted the provision so as to *avoid* declaring it unconstitutional. Moreover, our discussion of the constitutional difficulties inherent in a literal reading of § 8902(m)(1) was not an essential component of our holding that § 8902(m)(1) does not authorize jurisdiction. Even if a literal reading posed no constitutional concern, our analysis in part D of the principal opinion makes clear that the provision does not create

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[4] The government also argues that federal jurisdiction exists because federal law is a "necessary element" of the claim for relief. Brief of the United States at 2-3. In so arguing, the government relies on *Christianson v. Colt Industries Operating Group*, 486 U.S. 800 (1988), which simply reiterated the principle that federal jurisdiction "extends over only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* at 808 (citation and internal quotation marks omitted). For reasons explained in this opinion as well as in our original opinion, Empire's claim does not satisfy this test.

jurisdiction here. Reconsideration of the constitutional issue therefore could not affect the outcome of the case.[5]

Finally, we note our disagreement with the conclusions reached in *Blue Cross and Blue Shield of Illinois v. Cruz*, 396 F.3d 793 (7th Cir. 2005), which the Seventh Circuit decided ten days after we issued our original decision in *Empire*. The *Cruz* court rested its holding on arguments that we addressed and squarely rejected in our original opinion.

We have considered the remaining arguments set forth by Empire and its amici and find them to be without merit. By emphasizing such factors as the potential practical effects of our original holding on the administration of FEHBA programs, Empire and its amici present, at most, cogent arguments for why, as a policy matter, federal jurisdiction should be extended to cover Empire's claims. Such policy arguments, however, are for Congress rather than the courts to consider, for it is well-established that federal courts will not assume jurisdiction over contract disputes "in the absence of an unambiguous expression of congressional intent." *Jackson Transit*, 457 U.S. at 30 (Powell, J., joined by O'Connor, J., concurring); *see also id.* ("By enforcing contract rights not within the jurisdictional grant conferred by Congress, as much as by improperly inferring a right of action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. . . . This runs contrary to the established principle that [t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . ." (alterations in original) (citation and internal quotation marks

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[5] For similar reasons, contrary to Empire's contention, 28 U.S.C. § 2403 imposed no obligation to allow intervention by the government.

omitted)). The instant case provides no reason to depart from these principles.

For the reasons discussed, the petition for rehearing is DENIED.

Judge Raggi votes to grant rehearing for the reasons stated in her original dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square
New York 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 10th day of May two thousand five.

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross And Blue Shield,

Plaintiff-Appellant,

v. 03-9098

DENISE FINN MCVEIGH, as administratrix of the Estate of Joseph E. McVeigh,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Empire Healthchoice. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/

Motion Staff Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMPIRE HEALTHCHOICE ASSURANCE
d/b/a Empire Blue Cross and Blue Shield,

Plaintiff,

v.

DENISE FINN MCVEIGH, as administratrix of the Estate of Joseph E. McVeigh,

Defendant.

OPINION & ORDER
(03 Civ. 2728 (DLC)

DENISE COTE, *District Judge*

This case raises the issue of whether there is federal subject matter jurisdiction over a contract suit filed by the administrator of a federal employee health benefits plan against a beneficiary. Plaintiff Empire HealthChoice Assurance, or Empire Blue Cross Blue Shield ("Empire"), underwrites and administers a health benefits plan for federal employees and their dependents. It has brought suit to obtain reimbursement for benefits that it paid on behalf of one of its

beneficiaries to cover medical care he received following his injury in an accident. It claims an entitlement to money paid to the beneficiary's estate to settle a lawsuit over the accident brought on behalf of the beneficiary. For the following reasons, the defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

Pursuant to the Federal Employees Health Benefit Act, 5 U.S.C. § 8901 *et seq.* ("FEHBA"), the United States Office of Personnel Management ("OPM") is responsible for establishing and regulating federal health benefits plans. OPM entered a contract with the Blue Cross Blue Shield Association ("BCBSA") to create a Service Benefit Plan for federal employees. Empire is the entity that administers the BCBSA Service Benefit Plan in New York ("Plan").

Defendant Denise Finn McVeigh ("McVeigh") is the administratrix of the estate of Joseph E. McVeigh ("Estate"). Joseph E. McVeigh ("Decedent") had been enrolled in the Empire Plan. In 1997, the Decedent suffered injuries in an accident. Empire paid $157,309.06 in benefits for Decedent's medical treatment between 1997 and 2001, the year of his death. McVeigh filed a tort action in state court on her own behalf and on Decedent's behalf against the third parties who allegedly had caused Decedent's injuries. A suit on behalf of the McVeigh's minor child also was filed in state court. In March 2003, the litigants entered a stipulation settling the lawsuits for a total of $3,175,000.

Before the settlement had been entered, Empire became aware that McVeigh had reached an agreement with the defendants in the state court action. Empire notified McVeigh's counsel that it had a lien on the Estate's share of the settlement for $157,309.06, the amount paid out in benefits under Empire's Plan. McVeigh disputed the existence of the lien. Since the dispute between Empire and McVeigh had not been resolved at the time the stipulation was entered, McVeigh agreed to place $100,000 of the

Estate's portion of the settlement funds in escrow pending resolution of Empire's claims. Empire agreed that it would assert its claim by filing suit within thirty days of the March 19, 2003 settlement hearing. This is that lawsuit.

Empire's claim to $157,309.06 from the McVeigh Estate arises from the Plan. The Plan contains subrogation and right-of-recovery provisions which entitle the local BCBSA administrator to reimbursement if the Plan participant recovers compensation from a third party for injuries suffered for which the administrator paid benefits. The Plan provides that "the Plan is subrogated to [the participant] and [his] dependent's present and future claims against a third party." It also provides that "All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Plan for benefits paid." It provides that the Plan will have a lien on recoveries obtained from third parties, and that participants are required to notify the Plan of any recovery from third parties and "to reimburse the Plan to the extent of benefits paid by the Plan."

Empire asserts two causes of action. First, Empire claims McVeigh breached the terms of the Plan by refusing to reimburse Empire the amount Decedent received in benefits, and by rejecting Empire's assertion of a lien. Second, Empire seeks a judgment declaring that pursuant to the Plan, FEHBA and its regulations, and federal common law, it is entitled to reimbursement from McVeigh for the amount of benefits paid. The complaint does not assert diversity jurisdiction. McVeigh moves to dismiss for lack of subject matter jurisdiction, for failure to state a claim, and on the ground that the action is time-barred by the statute of limitations; in the alternative, she moves for summary judgment.

Discussion

Empire claims that federal jurisdiction over this action exists because resolution of the claims will require

construction of FEHBA and the regulations and contracts promulgated thereunder and because the action implicates federal common law. Neither argument is compelling, and each is addressed below.

Pursuant to Section 1331 of Title 28 of the United States Code ("Section 1331"), federal courts have jurisdiction over actions "arising under the Constitution, laws, or treaties of the United States." *Id.* Federal question jurisdiction is "limited," and "must be determined by reference to the well-pleaded complaint." *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 807-08 (1986) (citation omitted). The "vast majority" of the cases in which there is federal question jurisdiction are cases in which "federal law creates the cause of action," *id.* at 808 (citation omitted), although there may also be jurisdiction where resolution of a claim necessarily turns on construction of federal law. *Id.* The fact that a court must interpret federal law or federal regulations to determine the merits of the action is not ordinarily sufficient, however, to confer federal jurisdiction. *Id.* at 813-14. Any other rule would undercut the Congressional determination not to create a private right of action. *Id.* at 812. Therefore, "where state law creates the cause of action, we ask whether that cause of action poses a substantial federal question." *D'Alessio v. New York Stock Exchange*, 258 F.3d 93, 99 (2d Cir. 2001) (citation omitted).

If federal common law governs a case, there is subject matter jurisdiction just as there is when a federal statute governs the case. *See Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972)). There is, however, "no federal *general* common law." *Id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)) (emphasis supplied by *Woodward*). Instead, federal common law applies only to the few cases raising "uniquely federal interests." *Boyle v. United Tech. Corp.*, 487 U.S.

500, 504 (citation omitted); *see also Woodward Governor Co.*, 164 F.3d at 126-27. Such interests arise only in limited areas, such as "(1) the obligations to, and rights of, the United States under its contracts; (2) the liability of federal officers for official acts; and (3) civil liabilities arising out of federal procurement contracts relating to national defense." *Woodward Governor Co.*, 164 F.3d at 127 (citing *Boyle*, 487 U.S. at 504-06)).

A federal common law rule of decision will not be created unless "there is a significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (citation omitted). "[A]n actual, significant conflict between a federal interest and state law must be 'specifically shown,' and not generally alleged." *Woodward Governor Co.*, 164 F.3d at 127 (quoting *Atherton v. FDIC*, 519 U.S. 213, 214 (1997)). Without a significant conflict, "a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule." *B.F. Goodrich v. Betkowski*, 112 F.3d 88, 90 (2d Cir. 1997) (*per curiam*).

The FEHBA does not purport to create a private cause of action under federal law. It provides only that "[t]he district courts of the United States have original jurisdiction . . . of a civil action or claim *against the United States* founded on this chapter." 5 U.S.C. § 8912 (emphasis supplied). Nor does FEHBA completely preempt relevant state or local law relating to health insurance or plans. The FEHBA preemption provision provides only that

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans *to the*

> *extent that such law or regulation is inconsistent with such contractual provisions.*

5 U.S.C. § 8902m(l) (emphasis supplied).

The FEHBA gives OPM authority to contract with qualified carriers, 5 U.S.C. § 8902(a), but does not dictate the terms of the contracts. For example, the statute requires that each contract entered pursuant to FEHBA shall include a statement of benefits, *id.* at § 8902(d), but does not set forth the specific benefits or provisions to be included in each contract. It provides, *inter alia*, that "the [OPM] may prescribe reasonable minimum standards for health benefits plans . . . and for carriers offering the plans," *id.* at § 8902(e), but does not define those standards. Sections 8903 and 8903a of FEHBA set forth the types of health benefits plans the OPM may contract for, but they do not set forth detailed provisions to be included in each contract. *See id.* at §§ 8903(1)-(4) & 8903a(a)-(d). Similarly, Section 8904 sets forth the types of benefits to be provided under the various plan types, but does not detail the provisions to be included in each statement of benefits. *See id.* at § 8904 (1) - (4).

Empire's claims for breach of contract and for declaratory judgment require determinations regarding the respective rights and obligations of two private parties to the health insurance contract at issue.[1] This is insufficient to create federal jurisdiction. Instead of alleging the "uniquely federal interest" required to establish federal jurisdiction arising under federal common law, *Boyle*, 487 U.S. at 504, the only federal interest Empire identifies is the potential recovery by the United States Treasury of any reimbursement paid by the

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[1] Empire does not argue that it is anything but a private entity, and does not attempt to invoke Section 8912 of FEHBA, which creates federal jurisdiction over claims arising under the statute against the United States.

McVeigh estate to Empire. In addition, Empire has not identified "an actual, significant conflict" between state law and any federal interest. *Woodward Governor Co.*, 164 F.3d at 127. Instead, Empire suggests that the mere act of applying state law will create a conflict because it will undermine the federal interest in uniformity. As the Second Circuit has made clear, however, an interest in uniformity is insufficient by itself to give rise to federal jurisdiction. *See B.F. Goodrich v. Betkowski*, 112 F.3d 88, 91 (2d Cir. 1997) (*per curiam*).

Empire's alternative argument that the Statement of Benefits is itself "federal law," and equivalent to a federal regulation, is similarly unavailing. Even the mandatory incorporation of federal standards into a contract does not transform that contract into a regulation, nor create federal jurisdiction over an action for breach of the contract. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CFO-CLC*, 457 U.S. 15, 22-23 (1982); *J.A. Jones Constr. Co. v. City of New York*, 753 F. Supp. 497, 501 (S.D.N.Y. 1990). "Because a federal court should exercise extreme caution before assuming jurisdiction not clearly conferred by Congress, we should not condone the implication of federal jurisdiction over contract claims in the absence of unambiguous expression of congressional intent." *Jackson Transit.*, 457 U.S. at 30 (Powell, J., concurring).

Empire relies heavily on the Second Circuit's decision in *Marcus v. AT&T Corp*, 138 F.3d 46 (2d Cir. 1998), in which the court held that federal jurisdiction existed over an action for breach of the warranties contained in certain tariffs required by the Federal Communications Act to be filed with the Federal Communications Commission. *Id.* at 56. The tariffs "*conclusively and exclusively* enumerate the rights and liabilities of the contracting parties," and are the governing "law." *Id.* (citation omitted) (emphasis in original). Although the Plan was established pursuant to the OPM's

obligations under FEHBA, no federal statute or regulatory scheme sets out the terms of the Plan, or the rights and obligations of its participants, and the Plan is not filed with or enforced by any regulatory agency. OPM's authority under federal law to contract for health benefits plans does not convert the terms of the plans themselves into federal law or otherwise confer federal jurisdiction over an action for breach of a plan's provisions. *See Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 313 (5th Cir. 1994) (breach of contract claim by enrollee to recover benefits). *But see Caudill v. Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74, 78-79 (4th Cir. 1993). The other cases on which Empire relies are also inapposite. *In MedCenters Health Care v. Ochs*, 26 F.3d 865 (8th Cir. 1994), the Eighth Circuit found that federal law applied pursuant to FEHBA's partial preemption provision because the contract provisions had been shown to conflict with the applicable state law. *Id.* at 866-67. In *Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572 (11th Cir. 1985), the plaintiff directly challenged OPM's decision to approve a change in a benefits plan. *Id.* at 1575. Here, however, Empire seeks to enforce the terms of the Plan, not to challenge the validity of any federal agency action.

Finally, Empire argues briefly that federal law preempts its state law claims. FEHBA's partial preemption provision does not create jurisdiction over this lawsuit. Unlike ERISA, FEHBA preempts state law only if that law is inconsistent with the terms of a FEHBA benefit or coverage contract.[2]

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[2] Empire omits from its argument -- and from its quotations -- the text of the statute which provides that preemption exists only "to the extent that such [State or local] law or regulation is inconsistent with such contractual provisions." 5 U.S.C. § 8902(m)(1).

See 5 U.S.C. § 8902m(1). Since there has been no identification of inconsistency here, there is no preemption.

Conclusion

This breach of contract and declaratory judgment action between private parties does not raise a federal question. The motion to dismiss for lack of subject matter jurisdiction is granted. The Clerk of Court shall close the case.

SO ORDERED:

Dated: New York, New York
September 18, 2003

Denise Cote
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMPIRE HEALTHCHOICE ASSURANCE,
d/b/a/ Empire Blue Cross and Blue Shield,

Plaintiff,

- against -

DENISE FINN MCVEIGH, as administratrix of the Estate of Joseph E. McVeigh,

Defendant.

JUDGMENT
(03 CIVIL 2728 (DLC)

Defendant having moved to dismiss for lack of subject matter jurisdiction and the matter having come before the Honorable Denise Cote, United States District Judge, and the Court, on Sept. 18, 2003, having rendered its Opinion (89067) and Order granting the motion to dismiss for lack of subject matter jurisdiction, and closing the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (89067) and Order, dated Sept. 18, 2003, defendant's motion to dismiss for lack of subject matter jurisdiction is hereby granted and the case is closed.

Dated: NYC, NY
September 23, 2003

J. Michael McMahon
Clerk of the Court

BY: /s/
Deputy Clerk

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-3098

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross and Blue Shield,

Plaintiff-Appellant,

v.

DENISE FINN MCVEIGH, as administratrix of the Estate
of Joseph E. McVeigh,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT' OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS
CURIAE SUPPORTING APPELLANT'S PETITION FOR
REHEARING AN RE HEARING EN BANC

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this brief as amicus curiae in support of appellant' petition for rehearing and rehearing en banc. This suit implicates critical aspects of the program under which the federal government provides health insurance benefits to its own employees. In concluding that the suit presented no federal question conferring jurisdiction on the district court, the panel misapprehended the nature of the contract at issue in this suit, which determines the rights, benefits and duties of program enrollees, insurance carriers, and the federal government itself. Its decision conflicts with authoritative decisions of other courts of appeals that have addressed this issue and presents a question of exceptional importance warranting further review. *See* Fed. R. App. P. 35(b)(1)(B).

The Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901 *et seq.*, establishes a comprehensive scheme for the provision of health care benefits to federal employees, annuitants, and their families. Pursuant to the statute, the federal government contracts with various carriers, including the Blue Cross Blue Shield Association, to offer health benefits plans meeting standards established by the government and contained in the contracts. The federal government pays the greater part of the premiums which, along with the enrollee's share, are deposited into the Federal Employees Health Benefits Fund ("Fund") in the United States Treasury. Blue Cross draws against the Fund on a "checks-presented" basis to pay for enrollees' covered health care services. Any balance in the Fund is the property of the government. The carrier's profit, if any, comes from a negotiated service charge.

The government contract establishes not only the rights and duties of the government and carrier, but also the benefits and responsibilities of enrollees. An enrollee's right

to benefits under the terns of the contract is qualified by the duty to make reimbursement when the enrollee receives payment for the same illness or injury for which he has received benefits. The contract requires such repayment and also requires the carrier to seek reimbursement if repayment is not made voluntarily.

In this suit, the carrier sought to meet its contractual responsibilities by enforcing an enrollee's responsibility to make reimbursement for benefits received. A divided panel of this Court held that the carrier's claim does not arise under federal law and may not proceed in federal court. That holding conflicts with decisions of three other circuits. *See Blue Cross and Blue Shield of Illinois v. Cruz*, __ F 3d __, 2005 WL 129769 (7th Cir. Jan. 24, 2005); *MedCenters Health Care v. Ochs*, 26 F.3d 865 (8th Cir. 1994); *Caudill v. Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993).

The panel majority departed from settled principles of law. Federal question jurisdiction exists if federal law either creates the cause of action or is a "necessary element" of the claim for relief. *Christianson v. Colt Indus. Operating Group*, 486 U.S. 800, 808 (1988). Under either prong of this inquiry, jurisdiction exists here.

As the Supreme Court explained in *Jackson Transit Auth. v. Local Division 1285*, 457 U.S. 15, 23 (1982), private suits to enforce contracts "contemplated by federal statutes" state a federal claim as long as Congress intended that the contracts be "creations of federal law" and that "the rights and duties contained in those contracts be federal in nature." The federal character of FEHBA contracts should be beyond question. The federal government itself is a party to the FEHBA contracts, which are the means by which the federal government provides health care benefits to its own employees and annuitants. The contracts establish the terms on which benefits are paid, and disputes regarding the

entitlement to benefits are resolved in federal administrative proceedings followed by federal court review. The duty to make *repayment* stems from the same contract and presents a federal question just as clearly as the right to receive benefits in the first place.

Alternatively, federal jurisdiction plainly exists under the second prong of *Christianson*. Whether repayment is owed turns on the application and interpretation of the federal contract that defines the enrollee's right to benefits and duty to make repayment. Because the contract is governed by federal law, federal law is a necessary element of the claim for relief.

STATEMENT OF FACTS

A. The Federal Employees Health Benefits Act.

Congress enacted the Federal Employees Health Benefits Act to establish a comprehensive program that would "assure maximum health benefits for employees at the lowest possible cost to themselves and to the Government." H.R. Rep. No. 86-957, at 4 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913, 2916. Today, approximately four million enrollees and their families receive health insurance through plans under FEHBA, at a total cost of about $27 billion per year in premiums, $20 billion of which is paid by the federal government.

The FEHBA delegates broad authority to the Office of Personnel Management ("OPM") to administer the Federal Employees Health Benefits Program, *see* 5 U. S. C. §§ 8901-13, and to promulgate regulations necessary to carry out the statute's objectives, *see id.* § 8913. In particular, the statute gives OPM authority to contract with carriers to offer health benefits plans available to federal employees, annuitants, and dependents. *Id.* §§ 8902, 8903. Such plans must meet criteria established by OPM, and the contract must contain "a detailed statement of benefits offered and shall include such

maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable." *Id.* § 8902(d). Enrollees are bound by the contract's terms. *See Christiansen v. National Sav. & Trust Co.*, 683 F.2d 520, 530 (D.C. Cir. 1982).

By statute, the government and the enrollee share responsibility for premiums payable to the plan. 5 U.S.C. § 8906. The employing agency (or OPM for annuitants) pays 72% to 75% of the premium as part of its payroll costs funded by general appropriations. *Id.* §§ 8906(b)(1), (b)(2), (f). Premiums are deposited into a special Treasury fund called the Federal Employees Health Benefits Fund. *Id.* § 8909(a).

Under the type of plan at issue in this litigation, the carrier draws against the Fund on a "checks-presented" basis to pay for covered health care services. *Id.* § 8909(a); 48 § C.F.R. 1632.170(b). Any balance in the Fund is not the property of carrier. Rather, the carrier's profit, if any, comes from a negotiated service charge. *See National Assn of Postal Supervisors v. United States*, 21 Cl. Ct. 310, 315 (1990) ("The service charge is the only profit element of FEHBA. * * * [The] carrier may not make a profit on the premium charges themselves."), *aff'd mem.*, 944 F.2d 859 (Fed. Cir. 1991); *see also* 48 C.F.R. § 1615.902. Any surplus in a plan's contingency reserves may be used, at OPM's discretion, to defray future rates, reduce future government and employee contributions, increase plan benefits, or refund the monies to the government and plan enrollees. 5 U.S.C. § 8909(b); 5 C.F.R. § 890.503(c)(2).

The government ultimately decides whether a claim for medical service should be paid under the program. 5 U.S.C. § 8902(j). If a carrier denies payment of a claim, the enrollee may seek OPM review. 5 C.F.R. § 890.105(a)(l). OPM's determinations are subject to judicial review in

federal court under the Administrative Procedure Act. *See, e.g., Muratore v. OPM*, 222 F.3d 918, 920 (11th Cir. 2000).

The FEHBA expressly provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m). This provision was enacted "to establish uniformity in Federal employee health benefits coverage," H.R. Rep. No. 95-282, 95th Cong., 1st Sess., at 1 (1977), and broadened in 1998 "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," H.R. Rep. No. 105-374, at 9 (1997).

B. The OPM Contract With Blue Cross Blue Shield.

The largest plan in the Federal Employees Health Benefits Program is the Blue Cross Blue Shield Service Benefit Plan. Pursuant to 5 U.S.C. § 8902, OPM has entered into annual contracts with the Blue Cross Blue Shield Association acting on behalf of a number of Blue Cross Blue Shield affiliates. The contract between the government and Blue Cross establishes the rights and duties of enrollees. The contract, like contracts with other carriers, includes a reimbursement provision requiring enrollees who receive compensation from a third party for an injury or illness to refund benefits paid.[1] Where enrollees do not return monies voluntarily, the

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[1] The provision is reproduced at J.A. A785 and states in relevant part:

(footnote continued on next page)

contract requires Blue Cross to make "a reasonable effort to seek recovery of amounts it is entitled to recover in cases which are brought to its attention," J.A. A140, and to "subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract," *id.*

C. Proceedings To Date.

Empire brought this action to enforce that reimbursement requirement. The complaint invoked the district court's federal question jurisdiction and alleged that the action was founded on FEHBA, on federal contracts and regulations established pursuant to FEHBA, and on the federal common law. The district court dismissed the action, holding that Empire's suit does not arise under federal law.

A divided panel of this Court affirmed. The panel majority believed that federal question jurisdiction turns on whether Empire could identify an actual, significant conflict between the operation of New York law and the federal interest in the uniform enforcement of FEHBA contract terms. Because no such conflict was identified, the Court held that there is no subject matter jurisdiction. In dissent, Judge Raggi concluded that there is federal question jurisdiction because

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(footnote continued from previous page)

> If another person or entity * * * causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to amounts for benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees.

federal common law governs all disputes involving the enforcement of FEHBA contracts.

ARGUMENT

A district court has federal question jurisdiction under 28 U.S.C. § 1331 if federal law creates the cause of action or if federal law is a "necessary element" of the claim for relief. *Christianson v. Colt Indus. Operating Group*, 486 U.S. 800, 808 (1988). The present suit satisfies both prongs of that inquiry.

A. Federal Law Creates the Cause of Action.

As the Supreme Court explained in *Jackson Transit*, suits to enforce contracts "contemplated by federal statutes" set forth federal claims and state federal causes of action if Congress intended that the contracts be "creations of federal law," and that "the rights and duties contained in those contracts be federal in nature." 457 U.S. at 22-23.[2] As in *Jackson Transit*, there is no question that Congress intended FEHBA contracts to be enforceable. *See id.* at 20-21. And the federal character of FEHBA contracts is evident. The Jackson Transit standard is plainly satisfied where the United States itself is a party to the contract, the applicable statute makes clear that the contract is governed by federal law, and the suit is brought either by the United States or, as here, by a party to the contract pursuant to its right and obligation to enforce the contract on behalf of the United States.

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[2] *See also, e.g., International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 691 (1963) ("It is federal law which would determine whether a contract [made pursuant to the Railway Labor Act] is valid and enforceable according to its terms."); *Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355, 362-66 (4th Cir. 2004) (applying the *Jackson Transit* framework to contracts made pursuant to the Telecommunications Act of 1996).

Although *Jackson Transit* concluded that the contract at issue in that case did not arise under federal law, its analysis leaves no doubt that the opposite conclusion is required here. *Jackson Transit* considered a contract between a local transit authority and its employees. The local transit authority had acquired the failing transport company with the assistance of federal funds provided under the Urban Mass Transportation Act of 1964. As a condition on the receipt of federal funds, the local transit authority was required to make arrangements to preserve the transit workers' collective bargaining rights. *See* 457 U.S. at 16.

The Supreme Court observed that it was not apparent from the face of the statute whether the private party contract dispute would arise under federal law, but found that the legislative history of the statute was "conclusive" in demonstrating Congress's intent that state law govern, *id.* at 24, stressing that Congress had not intended to disturb the National Labor Relations Act's exemption for labor relations between local governments and their employees, *see id.* at 23.

The regulatory scheme established by the FEHBA and the contract authorized by that statute are in stark contrast to the provisions at issue in *Jackson Transit*. The FEHBA is a comprehensive program governing the health insurance of federal employees, annuitants, and their families. The FEHBA contracts define rights and obligations of the federal government, the carriers and the enrollees. The contract defines the right of an enrollee to receive benefits in the first instance, and also defines the enrollee's obligation to repay those benefits in some circumstances. It is settled that disputes about *payment* of benefits present a federal question. Such disputes are resolved by OPM in administrative proceedings subject to federal court review. *See, e.g., Muratore v. OPM*, 222 F.3d 918, 920 (11th Cir. 2000). The duty to make *repayment*, which arises from the

same contract, likewise presents a federal question. When the enrollee does not make repayment voluntarily, the carrier, in fulfillment of its own obligations under the contract, *see* J.A. A 140, may bring suit against the enrollee to enforce the enrollee's responsibilities under the contract. The route of resolution is different from the means for resolving initial payment disputes, but the federal nature of the obligation to make repayment is issue is just as clear as the federal nature of the right to receive the benefits in the first place.

Nor is there any doubt of the federal government's interest in the enforcement of repayment as well as payment obligations. Benefits payments derive from accounts that are funded and administered by the United States and maintained on the books of the United States Treasury. Payments to the carrier are made on a "checks-presented" basis, and the carrier has no property interest in any balance remaining in the Treasury fund after benefits are paid out and reimbursements received. The requirement that enrollees reimburse the carrier for monies obtained in tort suits is thus a critical feature of the federal health benefits program that inures to the benefit of the government.

If the reimbursement provision were contained in the statute or regulations there could be no dispute as to federal jurisdiction. The result does not change because the requirement is found in the government contract. It is black-letter law that the "obligations to and rights of the United States under its contracts are governed exclusively by federal law." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). As the Supreme Court has stressed: "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any

state." *United States v. Allegheny County*, 322 U.S. 174, 183 (1944), *overruled on other grounds*, *United States v. City of Detroit*, 355 U.S. 466 (1958); *see also Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943).

Indeed, the FEHBA expressly provides for field preemption, stating that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m). Thus, only federal law may govern FEHBA contracts. As the provision's history makes clear, *see* p.6, *supra*, absent such field preemption "[f]ederal employees in different states would have different reimbursement obligations and hence different net benefits," a result "contrary to the uniformity goal of FEHBA in general and its preemption provision in particular." *Cruz*, 2005 WL 129769, at *4; *see also* slip op. at 42-43 (Raggi, J., dissenting); *Botsford v. Blue Cross & Blue Shield of Montana*, 314 F.3d 390, 394 (9th Cir. 2002).

B. Federal Law Is A Necessary Element Of Empire's Claim.

Because the claim in this suit states a federal cause of action, jurisdiction exists on that basis. Jurisdiction also exists because federal law is a "necessary element" of Empire's claim. *Jones v. R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836, 1842 (2004) ("[A] claim arises under federal law if federal law provides a necessary element of the plaintiff's claim for relief.").[3] The existence of the FEHBA contract

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[3] *See also, e.g., City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997); *Merrell Dow Pharmaceuticals v. Thompson*, 478 U. S. 804, 808-809 (1986); *Smith v. Kansas City Title & Trust*, 255 U.S. 180 (1921); *Verizon*, 377 F.3d at 364-65.

and the validity and meaning of its reimbursement requirement are necessary elements of Empire's claim. And as explained above, the "validity and construction" of FEHBA contracts, including the "liens which they create or permit, all present questions of federal law not controlled by the law of any state." *Allegheny County*, 322 U.S. at 183. In light of the enormous federal interest in the uniform application of its benefits contracts, even if state law could be thought to provide Empire's bare cause of action, federal law would provide the substantive law governing the interpretation of the contract.

C. The Panel's Decision Misapprehends The Relevant Legal Inquiry And The Nature of the Federal Interest.

The panel's central premise is that the existence of a federal cause of action depends on whether a conflict between federal interests and state law can be identified in a particular case. The Supreme Court made clear in *Jackson Transit* that this is not the relevant inquiry with respect to private contract suits, even when the United States is not a party to the contract. Indeed, if the rights and duties of carriers and enrollees were set out in regulations rather than in the governing contract, no one would argue that the validity and meaning of the federal regulations would present a federal question only if the regulations conflicted with state law.

The panel's error may reflect a misunderstanding of the role of the governing contract and the extent to which it establishes the rights and duties of enrollees as well as the government and the carriers. It may also reflect a misunderstanding of the FEHBA payment scheme, in which Blue Cross draws payments from a designated Treasury fund on a "checks presented" basis and has no property interest in the money left in the fund at the end of the fiscal year.

The conflict between federal and state law was significant in *Boyle* because *Boyle* was *not* a suit to enforce a government contract, but a state-law tort claim against a government contractor. The state-law claim was displaced by federal common law because of its indirect potential to undermine the rights and duties created by the federal contract. Likewise, *Woodward Governor Co. v. Curtiss-Wright Flight Sys.*, 164 F.3d 123, 127 (2d Cir. 1999), was not a suit to enforce a government contract but a suit to enforce a subcontract. This Court held that the subcontract was "too far removed" from the federal interests to warrant the application of federal common law. Neither decision casts doubt on federal jurisdiction here.

Finally, contrary to the panel's suggestion, slip op. 10-13, the terms of a federal contract may displace state law just as surely as if those terms were reflected in federal regulations. The FEHBA is a valid exercise of Congress's spending power, and any state law that interferes with the purposes of the program is properly displaced. A FEHBA contract is not a "privately-negotiated contract," *id.* at 11, but a government contract, made pursuant to federal statute and regulations, that governs the rights and benefits of federal enrollees. State law must give way to the extent that it impairs the enforcement of any federal right or program, including a procurement program. *See Allegheny County*, 322 U.S. at 183 ("Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls."); *M'Culloch v. Maryland*, 17 U. S. 316, 427 (1819) ("It is the very essence of supremacy . . .to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."); *Boyle*, 487 U.S. at 512 (finding preemption based on conflict

between state law and the terms of a federal procurement contract).

CONCLUSION

For the foregoing reasons, the panel decision should be vacated and the judgment of the district court reversed.

Respectfully submitted,

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